Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

M. MAUREEN POLSBY, M.D., PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, DR. THOMAS CHASE, DR. IRWIN J. KOPIN, DR. MARK HALLETT, DR. DANIEL R. WEINBERGER, DR. GIOVANNI DICHIRO, DR. MARINOS DALAKAS, DR. RICHARD E. CARSON, DR. MURRAY GOLDSTEIN, in his official capacity as director of the National Institute of Neurological Disorders and Stroke, DR. JAMES B. WYNGAARDEN, in his official capacity as director of the National Institutes of Health, RESPONDENTS

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether an appeals court panel composed only of judges who were in the majority in an *en banc* opinion reversed by this Court,[1] including the author of the reversed *en banc* opinion, may then circumvent this Court's decision by acting as **factfinder** and ruling on the **merits of claims** which had been **dismissed prior to trial** on the basis of the *en banc* opinion, before reversal.

2. Whether an appellant is entitled to know the composition of an appeals court panel in advance of the panel's decision, and whether the panel in this case should have recused itself upon request of the appellant.

3. Whether the plaintiff in a case involving sexual harassment, as in Clinton v. Jones, 518 U.S. 1016 (1996), is entitled to introduce evidence which would show a pattern of such behavior on the part of the individual accused of sexual harassment (see December 11, 1997 district court order in Jones v. Clinton), and whether a policy in the Fourth Circuit of preventing such evidence is in conflict with other circuits.

4. Whether the shortcut procedures employed by the circuit courts of appeal [especially in the Fourth Circuit, which states it does not need its two vacant judgeships filled, yet issues 90% of its appellate decisions (more than in any other circuit) as unpublished one-word affirmances of the lower court opinion] leads to dangerous deprivation of due process of law and also denies equal protection under the law to certain classes of appellants such as individual citizens who undertake to represent themselves *pro se*.

5. Whether it is an unconstitutional violation of the doctrine of separation of powers for the offices of U.S. Attorneys and members of

[1] Robinson v. Shell Oil Co., 519 U.S. 337 (1997) reversing Robinson v. Shell Oil, 70 F.3d 325 (4th Cir. 1995) (*en banc*).

congress to be located inside federal courthouses.

6. Whether it is a denial of due process of law for a district court to deny a Title VII plaintiff leave to amend her original complaint, to add fraud counts, on the grounds that Title VII provides the exclusive remedy for the events at issue, and then subsequently to deny discovery and deny the introduction at trial of evidence regarding the fraud on the grounds that fraud is irrelevant to Title VII claims; and whether it is a similar violation of due process of law for the trial court to exclude all evidence of widespread sexual harassment, discrimination and retaliation at the defendant government agency and subsequently for the court to nonetheless base its opinion, in part, on whether widespread sexual harassment, discrimination and retaliation could be proved.[2]

7. Whether a trial court may conclude that Title VII can not be applied in the field of medical research.

Addendum: Besides the intervening decision by this Court which should have automatically entitled petitioner to a new trial on the dismissed claims, the trial court decision on the claims which were tried was extremely flawed. As may already be evident, any one of a number of trial court errors should have resulted in petitioner being granted a new trial on the original discrimination claims, and with a jury rather than the judge as the factfinder. Additional legal questions are raised by the trial court's handling of this case.

[2]The agency itself publicly admitted it had serious problems with widespread sexual harassment and sex and race discrimination. (See Lodged materials 1-3). An agency task force appointed to address the problem of retaliation concluded that retaliation by NIH against employees who file Title VII complaints is almost universal. The trial court did not allow this evidence and yet in its opinion stated, "At its most sinister, Plaintiff's tale is an attempt to punish Dr. Chase and NIH for a belief that cannot otherwise be proved that gender discrimination was widespread at NIH." (App., *infra*, 12a).

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I. An appeals court panel may not deprive an appellant of due process of law and circumvent a Supreme Court decision, by taking it upon itself to act as factfinder and rule on the merits of claims which had been dismissed, before trial and before completion of discovery, on the basis of a circuit court opinion which was reversed by the Supreme Court while the appeal was pending. 16

II. An appeals court may not deny due process of law by refusing to disclose the identities of panel judges

and thereby deprive appellants of the opportunity to move to disqualify a panel in advance of its decision. Appeals courts must also select panel judges at random and not otherwise tamper with the selection of judges for a given case. 17

III. The case of Jones v. Clinton and the public attention it received, along with many other cases, has established that in cases of sexual harassment of a subordinate by an employer, the plaintiff may introduce evidence of a pattern of such behavior on the part of the individual accused of sexual harassment. Courts in the Fourth Circuit may not exclude such evidence on the grounds that a supervisor's similar behavior with other female subordinates is irrelevant. 17

IV. Affirmance procedures, as exemplified by their application in the instant case, differentially deny certain classes of appellants, such as *pro se* appellants, due process of law and equal protection under the law, and are in violation of the statute which created the federal circuit courts of appeal. At a minimum, this Court should provide guidance to the circuits as to what cases and procedures are appropriate for unexplained, unpublished affirmances. If staff attorneys are employed, the staff attorneys should be required to provide a written rationale which addresses all issues which were raised by the appellant on appeal and which is published and has precedential value. Also, if the appeals courts affirm a published lower court opinion without comment, then the circuit court should be willing to stand by the lower court opinion and accord it the status of a circuit court precedent. 19

V. If a crèche on the steps of a courthouse at Christmastime is a violation of the doctrine of separation of church and state [See Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989)], then the presence inside a courthouse of all three branches of government is surely a violation of the doctrine of separation of powers. The improper influence of one upon the other, or the appearance of improper influence, violates the most basic principles upon which our system of government was founded. 24

VI. It is a denial of due process of law for a court to rule that Title VII provides the exclusive remedy for certain claims and then refuse to admit evidence on those claims on the grounds that the evidence is irrelevant to a Title VII case. Similarly, it is a denial of due process of law for the district court to exclude all evidence of widespread Title VII violations at NIH and then to conclude in its opinion that wide spread violations could not be proved. 25

VII. A trial court may not exclude certain types of employment from coverage under Title VII simply because "scientific research is not the type of repetitive experience that lends itself to easy comparison within the framework of employment discrimination law." 25

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28 U.S.C. § 1254(1) 3

OTHER **Page**

Paul Cotton, "Harassment linked to fraud, lawsuit alleges," JAMA, February 12, 1992, volume 267, No.6 16

William Glaberson, "Caseload Forcing Two-Level System For U.S. Appeals," *New York Times*, front page, March 14, 1999 20

Mark Johnson and John Hoeffel, Media General News Service, "Helms: Trim 4th Circuit Ranks; Chief Jurist Backs Cut in Judgeships," *Richmond Times-Dispatch*, A2, March 13, 1999 22

Brooke A. Masters, "A Chance to Tip Scales of Justice," *The Washington Post*, B5, Sunday, April 26, 1998 23

J. Harvie Wilkinson III, *One Nation Indivisible, How Ethnic Separatism Threatens America* (Reading, MA: Addison-Wesley Publishing Company, Inc., 1997) 23

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PETITION FOR A WRIT OF *CERTIORARI*

M. Maureen Polsby, M.D., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The most recent opinion of the court of appeals (App., *infra*, 1a) affirming the lower court opinion and additionally ruling on the merits of other claims which had been dismissed prior to trial and prior to completion of discovery on those claims, is unreported. The district court's opinion dismissing all post-employment retaliation claims, prior to trial, on the basis of Robinson v. Shell Oil, 70 F.3d 325 (4th Cir. 1995) (*en banc)*, which was reversed by this Court while petitioner's circuit court appeal was pending [in Robinson v. Shell Oil Co., 519 U.S. 337 (1997)], was a bench ruling, (See Lodged materials 4-34). The district court's opinion on the remaining claims (App., *infra*, 9a-38a) is reported at 925 F. Supp. 379 (1996).

The first court of appeals opinion in this case is reported as Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992). This Court vacated that opinion in Polsby v. Shalala, 507 U.S. 1048 (1993).

The district court's initial opinion which dismissed all defendants but the Department of Health and Human Services and all claims other than those brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII") is unreported. That court's opinion denying Dr. Polsby's motion to amend her complaint to add fraud claims (App., *infra*, 5a-8a) is unreported but can be found at 1990 WL 27874.

JURISDICTION

The court of appeals entered its second opinion in this case on October 21, 1998 (App., *infra*, 1a). The court of appeals denied Dr. Polsby's petition for rehearing and suggestion for rehearing *en banc* on January 4, 1999 (App., *infra*, 3a). This Court has jurisdiction under 28 U.S.C. § 1254 (1). On April 2, 1999, the Court granted an extention of time, to May 4, 1999, for the filing of this petition for a writ of *certiorari*.

STATEMENT

A. Introduction

Petitioner, much to her surprise, turned on the television one afternoon to find William R. Rehnquist, Chief Justice of the United States, reciting poetry. Justice Rehnquist declaimed as follows:

> Full many a gem of purest ray serene
> The dark unfathom'd caves of ocean bear;
> Full many a flower is born to blush unseen,
> And waste its sweetness on the desert air.

Justice Rehnquist was, at that moment, wasting his sweetness in the dark unfathom'd caves of the Fourth Circuit. It was June of 1997, and he was addressing the Fourth Circuit's Judicial Conference which was being broadcast on C-SPAN.[1]

Petitioner Dr. Polsby listened on and was further amazed when she realized that Justice Rehnquist had quoted the stanza from

[1] Justice Rehnquist's example first produced titters in the audience and then a spasm of extemporaneous poetry reciting by other conference participants who were eager to appear as cultivated as the Chief Justice.

Gray's "Elegy" in relation to the case of Robinson v. Shell Oil Co., 519 U.S. 337 (1997)[2]. Robinson was one of only two Fourth Circuit cases heard by the Court that term and had been the Fourth Circuit's only reversal. Moreover, Robinson was no ordinary reversal by a Court majority in disagreement with a three-judge panel, but rather a unanimous reversal of an *en banc* opinion [Robinson v. Shell Oil, 70 F.3d 325 (4th Cir. 1995) (*en banc*)].

Furthermore, the Robinson case had arisen from this case: Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992), Polsby v. Shalala, 507 U.S. 1048 (1993). (Polsby v. Chase is the same case as Polsby v. Shalala). At issue was whether the anti-retaliation provision, 42 U.S.C. §2000e-3(a) in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17, which forbids an employer from "discriminat[ing] against any of his employees***because he has made a charge under this subchapter," protects *former* employees against retaliation. The precedent set by the Fourth Circuit, that former employees are not protected under the anti-retaliation provision of Title VII, had originally been a *sua sponte* holding on that issue by the Fourth Circuit in Polsby v. Chase. J. Harvie Wilkinson, III, now Chief Judge of the circuit, had sat on the Polsby panel together with two senior judges (a senior circuit court judge and a senior district court judge sitting by designation). Robinson's case was subsequently dismissed in district court on the basis of the Polsby panel's holding. This Court then vacated Polsby v. Chase on other grounds. The defendant government agency confessed error and concurred with Dr. Polsby in asking the Court to vacate the Fourth Circuit's Polsby opinion.[3]

[2]The Chief Justice was making the point that the media often neglects cases that are the most important in day-to-day decisions of district court judges. He cited Robinson first and foremost of a group of such cases.

[3]There are various theories as to what motivated the government to take such an unusual step. Petitioner would like to believe that it was based on an appreciation of the merits of her claims.

B. Background of the Post-Employment Retaliation Claims and the Relationship Between the *Polsby* and *Robinson* cases:

M. Maureen Polsby, M.D., a neurologist and a graduate of Northwestern University Medical School, had been Chief Resident in Neurology at the New England Medical Center in Boston when she was offered a medical research fellowship and a career in medical research at the National Institutes of Health (NIH), an agency of the federal government. The particular fellowship Dr. Polsby was offered is extremely prestigious and can be considered somewhat analogous to a Supreme Court clerkship in the law. Dr. Polsby would be the fellow of Dr. Thomas Chase, who was at the time scientific director for all neurologic research at NIH.

The events at issue happened about fifteen years ago. Dr. Polsby had entered Georgetown University School of Medicine[4] in 1975, the first year Georgetown admitted women into its medical school classes. Most of the few women in medicine were expected to become pediatricians. Women were generally not admitted into neurology residencies. Dr. Polsby had been the only female neurology resident or fellow at the New England Medical Center. She was also the first woman to whom Dr. Chase had ever given the prestigious NIH fellowship.

The NIH fellowship was accredited for one year of the three-year neurology residency training requirement. Five of the six individually-named physician-defendants in this case began their NIH careers as fellows and had received one year of residency credit from NIH. Dr. Polsby left her New England Medical Center residency a few months earlier than she otherwise would have done because Dr. Chase promised her that she would receive credit for the remainder of her residency from NIH.

[4] She transferred to Northwestern between her first and second year because of her husband's job change.

The principal reason for Dr. Polsby's lawsuit is the destruction of her medical career, subsequent to her NIH fellowship, as a result of violations of the anti-retaliation provision of Title VII by Dr. Mark Hallett of NIH. Dr. Polsby left NIH after completing the initial two-year NIH medical research fellowship. Shortly after leaving NIH, she made an informal administrative EEO complaint (*i.e.*, had "sought EEO counseling"). She alleged damage to her research career because of sexual harassment, sex discrimination and misappropriation of her research by her exclusively-male colleagues.

After she made these initial allegations, the individuals whom Dr. Polsby named in her administrative complaint began fabricating criticisms of her which they had never made when she worked at NIH and before she made her complaint. More seriously, however, Dr. Hallett, who was one of the persons Dr. Polsby had named in the complaint, then wrote a grossly misleading letter to the American Board of Psychiatry and Neurology (ABPN) implying that Dr. Polsby should not be allowed to take the examination to become board-certified because she had not met the residency requirements and indicating that she was not entitled to residency credit from NIH. Dr. Polsby had completed a fellowship which was accredited for residency training. She had been promised the credit, had earned it, and was clearly entitled to it. When Dr. Hallett's first reason for denying the credit did not hold up, he invented a different reason.[5] Nonetheless, the ABPN would not allow Dr. Polsby to take her boards unless NIH certified the credit. Not only would Dr. Polsby

[5]Dr. Hallett wrote in his letter to the ABPN that NIH had "discontinued its policy" of giving residency credit. When Dr. Polsby proved that she had been at NIH almost two years before any policy change could have occurred, Dr. Hallett then claimed she had not followed some kind of application procedure for the credit in advance of doing the fellowship. She had completed a fellowship which was accredited for residency training by the graduate medical education accreditation committees of the American Medical Association. She had been promised the residency credit before coming to NIH. It was up to NIH to inform her of any necessary application procedures.

not be able to become a board-certified neurologist, she would not even be able to practice her profession as a neurologist without being considered to have finished her residency.

Dr Hallett had used the residency credit to illegally retaliate against Dr. Polsby for naming him in her Title VII claims. Dr. Polsby then added retaliation claims to her administrative complaint.

After the administrative procedure ran its 2 1/2-year course and the ensuing litigation and discovery consumed another 3 1/2 years, the district court dismissed Dr. Polsby's case on a motion for summary judgment on the original discrimination claims. The district court ruled in favor of a government agency which waited almost six years to raise the issue of whether an administrative complaint, which the agency had accepted for investigation, had been filed within thirty days of the "alleged discriminatory event." In dismissing Dr. Polsby's complaint, the district court did not properly address the retaliation claims which were timely filed and which, according to the continuing violation theory, should have made the timeliness issue on her original claims moot. The Fourth Circuit upheld the district court's dismissal of the original discrimination claims and added, *sua sponte*, that the retaliation claims could also be dismissed because the anti-retaliation provision of Title VII does not protect *former* employees. Dr. Polsby had completed her fellowship and was no longer an NIH employee at the time of the denial of residency credit.

Robinson's retaliation claims were against an employer who had given him bad references after he left his job. He had previously complained of race discrimination and had filed an EEO complaint. He lost his discrimination case but then filed retaliation claims alleging that he would not have been given the bad references but for the EEO complaint. Robinson's retaliation case was dismissed in district court on the basis of the precedent set by the Fourth Circuit in Polsby (*supra*) with respect to *former* employees not

being protected under the anti-retaliation provision of Title VII. While Robinson's Fourth Circuit appeal was pending, this Court then vacated the Fourth Circuit's Polsby opinion on other grounds.

Once the basis upon which Robinson's case had been dismissed, *i.e.*, Polsby v. Chase, had been vacated, Robinson initially won his Fourth Circuit panel decision on the former employee issue. Judge Clyde Hamilton was a dissenting member of that panel. The Fourth Circuit then granted Shell Oil's request for a rehearing *en banc* and in a 7 to 4 decision, overturned its own panel.[6] Judges Wilkinson and Motz did not participate in the *en banc* decision for reasons which are unknown. However, Judge Wilkinson had become Chief Judge by then, and it seems unlikely the court majority would have made such an unusual decision, which it knew to be in conflict with the other circuits, without the influence of Wilkinson who had been on the Polsby panel and who was the probable architect of the unusual precedent. Judge Hamilton authored the *en banc* opinion and quoted from the original Polsby panel opinion. He explicitly noted that Polsby had been vacated by the Supreme Court on other grounds and stated that the Fourth Circuit had been right, in Polsby, on the former employee issue.

At the time of the *en banc* Robinson decision, Dr. Polsby's case had been remanded for trial with her original discrimination

[6]At the time the Fourth Circuit created its original precedent on the former employee issue, in Polsby, it had denied Dr. Polsby's request for a rehearing and suggestion for rehearing *en banc* even though the panel opinion was clearly in conflict with the other circuits and even in conflict with precedent in the Fourth Circuit itself. Yet after the Supreme Court vacated the Fourth Circuit's Polsby opinion, and the original Robinson panel had interpreted the word "employee" in Title VII to encompass former employees in conformity with the other circuits including its own, the Fourth Circuit granted Shell Oil's request for rehearing *en banc*. This type of behavior on the part of the Fourth Circuit is judicial activism at its worst and shows the lengths to which the Fourth Circuit will go in order to rule against a plaintiff in a Title VII case.

claims and most of her retaliation claims intact. The district court was then obligated to dismiss Dr. Polsby's retaliation claims on the basis of Robinson, *en banc*. Dr. Polsby's retaliation claims were dismissed prior to trial and prior to completion of discovery on those claims. (See App., *infra*, 11A and Lodged materials, 4-34) Dr. Polsby's case went to trial with Dr. Polsby only being allowed to present evidence on her original discrimination claims. In fact, the trial judge would not allow any evidence arising after Dr. Polsby's employment even though relevant to the original discrimination. For example, the judge ruled that Dr. Polsby could not introduce as evidence letters from senior scientists which contained descriptions of Dr. Polsby's performance during her fellowship (See Lodged materials 41-42). The district judge said the letters could not be introduced because Dr. Polsby was a former employee at the time the letters were written.

On March 28, 1996, the district court published its opinion only on the evidence presented at trial and only on Dr. Polsby's original discrimination claims. The opinion was extremely flawed but was also described by Dr. Polsby's trial counsel as an "intentionally appeal-proof" opinion. Numerous attorneys, including the president of the Metropolitan Washington Employment Lawyers Association, told Dr. Polsby that no lawyer wants to appeal a Title VII case in the Fourth Circuit unless to represent a defendant. Moreover, not many defendants need to appeal to the Fourth Circuit because the trial courts throughout the Fourth Circuit have learned they are likely to be reversed if they rule in favor of a plaintiff. Dr. Polsby was repeatedly told by various attorneys that it would be a "waste of time" to file an appeal in the Fourth Circuit on behalf of a Title VII plaintiff, no matter how egregious the errors of the trial court.

Dr. Polsby appealed on her own. It took a year for the court reporter to produce the transcript of the three-week trial at a cost of $10,000., which Dr. Polsby was required to pay in advance. In the interim, the Court granted Robinson's petition for a

writ of *certiorari* and subsequently issued its unanimous reversal of the *en banc* Robinson opinion. Therefore, Dr. Polsby was now automatically entitled to reinstatement of her post-employment claims and would get a new trial on whether she had been retaliated against, regardless of whether she won on the discrimination claims. She could also now get a retrial of all her claims to a jury. With the inclusion of her post-employment retaliation claims, all her claims taken together form a pattern of ongoing illegal discrimination and retaliation continuing beyond the effective date of the Civil Rights Act of 1991 and would bring her case under the new law, which provides for jury trials in Title VII cases.[7]

This Court's reversal of the Fourth Circuit's *en banc* Robinson opinion unequivocally entitled Dr. Polsby to reinstatement of her post-employment retaliation claims which had been dismissed prior to trial and prior to completion of discovery on those claims. Because of the continuing violation theory, she would also be entitled to a retrial to a jury of all her claims. If defendants engaged in an ongoing pattern of illegal discrimination and retaliation, the continuing violation theory defines the pattern of illegal discrimination and retaliation as a single act which ends on the date of the most recent violation (See Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). Robinson entitles petitioner to a new trial in addition to, and separate from, the numerous egregious errors which were made by the trial court during the trial on the original discrimination claims.

Nonetheless, the lawyers who told Dr. Polsby it would be useless to appeal a Title VII case in the Fourth Circuit, regardless of the merits of the appeal, were right. The Fourth Circuit has gone so far as to illegally undertake to circumvent this Court. It has done so under cover of darkness in an unpublished *per curiam* opinion. It has affirmed the flawed lower court opinion without explanation

[7] The 1991 Act provides for a jury trial of Title VII claims as a result of recognition by Congress that district judges are often biased against plaintiffs in Title VII cases.

and then acknowledges this Court's reversal of Robinson, but, incredibly, then holds the lower court's dismissal of the claims "harmless as our review of the record reveals that the evidence failed to support her claims of post-employment retaliation. Accordingly, we affirm the dismissal of these claims as well." (App., *infra*, 2a).

The Fourth Circuit states it has reviewed a record which does not exist. The absence of evidence to support Dr. Polsby's post-employment retaliation claims is due to the dismissal of those claims before trial and before completion of discovery on those claims. (See App., *infra*, 11a and Lodged materials, 4-34) The Fourth Circuit's decision represents, at best, a serious misunderstanding of what happened at the trial court level. At worst, it represents a willful, illegal attempt by the Fourth Circuit to arrange the same outcome for Dr. Polsby's case despite the two Supreme Court reversals, Polsby v. Shalala, 507 U.S. 1048 (1993) and Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

This Court granted petitioner's previous petition for a writ of *certiorari* to the Fourth Circuit and vacated the Fourth Circuit opinion at Polsby v. Shalala, 507 U.S. 1048 (1993). "Cert" was indirectly granted a second time via Robinson v. Shell Oil Co., 519 U.S. 337 (1997). Robinson had lost his case in district court because of the precedent set by the Fourth Circuit on a second issue in Polsby, before it was vacated. The Fourth Circuit, *en banc*, in Robinson, then reiterated the position it had taken on the second issue in Polsby and affirmed the district court's dismissal of Robinson's case. This Court then granted Robinson's petition for a writ of *certiorari* and reversed the Fourth Circuit Robinson opinion as well. Thus this Court has twice reversed the Fourth Circuit's original Polsby decision on two separate issues. Nonetheless, the Fourth Circuit seems determined to rule against Dr. Polsby regardless of the law and regardless of this Court.

The Fourth Circuit's *en banc* Robinson opinion had been a 7 to 4 decision with some judges not participating. The current

Fourth Circuit decision in Dr. Polsby's case was made by a three-judge panel composed only of judges who had been in the majority in Robinson and included Clyde Hamilton, the author of Robinson.

Judge Hamilton and two other judges from the majority in the *en banc* Robinson opinion supposedly just happened to get assigned to Dr. Polsby's second Fourth Circuit panel. However, throughout all her litigation, Dr. Polsby has noted a surprising ability of the government to manipulate the judicial system.[8] After Dr. Polsby's previous experience with the Fourth Circuit in her Title VII case, she already had concerns about who would be on her panel and had asked the Clerk of the Court if she could be notified as to the panel's composition at the time of its selection. Dr. Polsby was told that the composition of panels is classified information to which Dr. Polsby would not be privy until after the decision was made (unless her case were scheduled for oral argument). She was assured, however, in writing, (See App., *infra*, 47a-48a) that the panels are selected at random by a computer.

Dr. Polsby has had a professional statistician calculate the odds that her panel, if it had truly been chosen at random, would be composed only from the seven judges who were in the majority on the *en banc* Robinson opinion and that the panel would include the author of Robinson. (See App., *infra*, 41a-46a). Based on background statistics acquired from the Fourth Circuit with respect to panel participation by circuit judges, including senior and visiting judges, the odds of Dr. Polsby being assigned such an unfavorable panel, purely by chance, are 2.68%. **This means that the odds the panel was not selected at random are 97.32%.** (For a complete analysis of this calculation see App., *infra*, 41a-46a).

After the decision, and after Dr. Polsby discovered the statistically-unlikely composition of her panel, she filed a motion to dis-

8 The situation in the new federal courthouse in Greenbelt, Maryland is particularly unhealthy.

qualify the panel on the grounds that the panel, after being reversed in Robinson, would have a vested interest in the outcome of her case being the same regardless of the reversal. The panel denied her motion and refused to disqualify itself (see App., *infra*, 3a-4a).

C. Factual Background of the Original Discrimination Claims

As explained earlier, Dr. Polsby was serving as Chief Resident in Neurology at a hospital in Boston when she was approached at a Boston medical meeting by Dr. Thomas Chase, a senior scientist from the National Institutes of Health (NIH). Dr. Chase recruited Dr. Polsby to be his research fellow and promised her that she would get credit for the remainder of her residency from NIH.

Later, Dr. Polsby traveled to San Diego to present a research paper on multiple sclerosis at the annual meeting of the American Academy of Neurology. The research was work she had done at the Harvard Medical School during her residency. It is very difficult to get a paper accepted into the Academy meeting, but Dr. Polsby's paper was accepted for platform presentation and given a prime spot on the program. The meeting in San Diego occurred just before the beginning of Dr. Polsby's NIH fellowship and just after Dr. Polsby left her residency.

Dr. Chase also attended the meeting and unexpectedly showed up to meet Dr. Polsby at the end of a class she was taking. He maneuvered her into his hotel room on a pretext, made sexual advances, including forcing a kiss on her, and expected her to begin an affair with him. He wanted her to skip the presentation of her paper and leave the week-long meeting to go to Mexico and vacation with him instead. She declined his advances in a tactful manner. Dr. Polsby hoped Dr. Chase would forget the incident and hoped that it would not affect her professional relationship with him.

When she arrived at NIH, she discovered Dr. Chase was known as a womanizer. Members of the department had walked in

on him on more than one occasion when he was having sex in his office with female subordinates. One of the male fellows had walked in while Chase's secretary was giving him oral sex. Chase had also conducted a lengthy affair with another female subordinate and, as he was also married at the time, he took the opportunity of having sexual relations with her in his office. He was not discreet. He had her desk placed immediately outside the door of his office, and the entire department was apparently aware of what went on when she disappeared into his office. This conduct of Dr. Chase can be proven because he was eventually officially reprimanded for it and for the disturbance it caused in the department. He was placed on administrative leave for a month, and the incident caused the breakup of Chase's marriage.

During his separation, Chase was in the habit of taking showers with his girlfriend (his NIH subordinate) in his apartment while his two young sons were also there on weekend visitation. Chase's wife testified in her divorce deposition that this got the children very upset. Chase had told them he was going to do what he wanted, and if they didn't like it they could go find themselves another father. Chase said that he had married his wife mostly to take care of his home and children but throughout his marriage had always sought his sexual gratification from other women.

By the time Dr. Polsby arrived at NIH, Chase had a different girlfriend now, a female psychiatrist who was not officially his subordinate, but rather a "visiting scientist" in Dr. Chase's department. She and Dr. Chase were living together. She had a private practice and other outside income and was not an NIH employee, but she had her own laboratory in Dr. Chase's department, and Dr. Chase gave her whatever resources and support she needed for her research. As scientific director Dr. Chase controlled a $70 million annual budget and the careers of every scientist in the institute[9] .

[9] However, after Chase hired Dr. Polsby, but before she began the fellowship, Dr. Chase had been fired as scientific director and was demoted to branch chief.

Dr. Polsby was appalled when she realized what members of the department believed about why she, Chase's first female medical staff fellow, had been given the prestigious fellowship. No one took her seriously as a neurologist or researcher.

Moreover, Dr. Chase assigned her the entirety of the lowest level duties which had previously been equally shared among the previously all-male fellows. He largely ignored her, even though he was supposed to serve as mentor to all the fellows. She was treated as the assistant to the male fellows and was expected to help them with their projects rather than have projects of her own. Chase gave flimsy excuses for turning down her research proposals and denied her requests for resources. He freely gave these resources to the male fellows who now worked full-time on their own research while Dr. Polsby was obligated to spend all her time on routine support duties. When she managed to accomplish significant research despite her circumstances, Chase and two male fellows, one of whom was junior to Dr. Polsby, took over her research and published it as their own work, listing the junior male fellow as first author.

After two years, Dr. Polsby's fellowship was not extended for what is generally considered a crucial third year for fellows who wish to establish a career in medical research. She was told there were not enough "slots," yet positions were somehow always found for every male fellow who wished to continue at NIH. One of Dr. Chase's colleagues, a senior NIH scientist, told her she should just go to bed with Chase and save herself this trouble. At the end of her fellowship, when Dr. Polsby finally filed an EEO complaint about the differential treatment and, in particular, the theft of her research, she was denied the residency credit she had been promised. The retaliation against her, by denial of the residency credit, effectively derailed and destroyed Dr. Polsby's career.

A few years later she discovered that those who had misappropriated her research had falsified most of the data they

published. (See App., *infra* 49a-53a, "Harassment linked to fraud, lawsuit alleges," JAMA, February 12, 1992, volume 267, No. 6). They claimed to have studied twice the actual number of patients and to have done numerous tests on the patients which were never, in fact, performed. They took over Dr. Polsby's data, patients and ideas but did not finish what she had begun. They published their papers without her knowledge or consent and included her name as a minor author to cover themselves because of her EEO complaint. They knew she could prove her claims of plagiarism. All of the notes and patient records were in her handwriting for a period of eight months before any of them had anything to do with the project. The fellow who was given credit for the project as first author had not even arrived at NIH until a year after Dr. Polsby and six months after she initiated the project.

Dr. Polsby discovered the fraud from one of her former NIH patients, Mr. Richard Duggan. He called Dr. Polsby to tell her he had discovered problems with respect to the research in which he and the other patients had participated at NIH. Mr. Duggan had taken it upon himself to read the papers published by the male fellows who had misappropriated Dr. Polsby's research and was in communication with all the other patients in the study because they had formed a support group. Duggan was editor of the support group newsletter.

REASONS FOR GRANTING THE PETITION

I. An appeals court panel may not deprive an appellant of due process of law, and circumvent a Supreme Court decision, by taking it upon itself to act as factfinder and rule on the merits of claims which had been dismissed, before trial and before completion of discovery, on the basis of a circuit court opinion which was reversed by the Supreme Court while the appeal was pending.

II. An appeals court may not deny due process of law by refusing to disclose the identities of panel judges and thereby deprive appellants of the opportunity to move to disqualify a panel in advance of its decision. Appeals courts must also select panel judges at random and not otherwise tamper with the selection of a judge for a given case.

III. The case of Jones v. Clinton, and the public attention it received, along with many other cases, has established that in cases of sexual harassment of a subordinate by an employer, the plaintiff may introduce evidence of a pattern of such behavior on the part of the individual accused of sexual harassment. Courts in the Fourth Circuit may not exclude such evidence on the grounds that a supervisor's similar behavior with other female subordinates is irrelevant.

The district judge in this case summarily denied Dr. Polsby the opportunity to introduce the abundant available evidence that Dr. Chase habitually behaves the way Dr. Polsby alleges he behaved toward her. The judge then went on to base her entire opinion on her belief that the harassment had not occurred. The harassment was largely a one-time occurrance with no one else present. However, the trial transcript shows that Dr. Chase's testimony was repeatedly impeached whereas Dr. Polsby's testimony was never impeached.

In fact, the fifteen witnesses the government flew in from all over the country, as well as from Germany, could not keep their stories straight from one moment to the next. Dr. Polsby's testimony and that of her six witnesses was consistent. The judge held the consistency of Dr. Polsby's testimony against her and said she doesn't believe Dr. Polsby could have such a good memory for events and statements of others which were made long ago. The judge says she knows the sexual harassment didn't happen and then loads her published opinion with the pejorative statements about

Dr. Polsby made by the defendants. She acknowledges that the criticisms were not proved to have been made about Dr. Polsby when she worked at NIH and before her complaint, and that many of the witnesses were not truthful, but nonetheless, the judge was very liberal about including all the fabricated criticisms in her published opinion. The judge mischaracterized and misinterpreted the incident in San Diego. Dr. Polsby had attended numerous medical meetings of several thousand male neurologists plus a handful of women. She was not "alarmed" or "helpless" when Chase made the "pass" at her. When Dr. Chase unexpectedly showed up to meet her at the end of her class, lounging in the doorway like a boyfriend with a certain expression on his face, Dr. Polsby simply knew what he intended. She handled the situation tactfully and was willing to forget it. She never filed a sexual harassment complaint. She filed a complaint over being treated differently from the male fellows.

Even if Dr. Polsby's entire testimony and that of her witnesses were disregarded by the judge, NIH's own witnesses proved the differential treatment. To this the judge opined:

> Plaintiff's attempt to compare her experience with that of the other fellows is unavailing. A medical staff fellowship is inherently unique for each researcher. Scientific research is not the type of repetitive experience that lends itself to easy comparison within the framework of employment discrimination law.

She also stated:

> Research in the ETB was under Dr. Chase's control and his decision on the allocation of resources and the direction of research cannot be challenged...

Of note is that the judge disregarded the testimony of Dr. Polsby's expert, the former Chairman of Neurology at the University of Pittsburgh, after the fact, on the grounds that he had testified

pro bono! He had testified about career paths of researchers, mentoring, the purpose of fellowships and the merits of some of Dr. Polsby's research proposals.

Dr. Polsby was entitled to present evidence of a pattern of inappropriate sexual behavior on the part of Dr. Chase, just as are plaintiffs in other circuits. The district judge excluded such evidence and then based her opinion on the entire case almost exclusively on her belief that the sexual harassment had not occurred. The judge then proceeded to ignore or gloss over Dr. Polsby's principal case and the defendants' own testimony which proved the differential treatment of Dr. Polsby during her fellowship

IV. Affirmance procedures, as exemplified by their application in the instant case, differentially deny certain classes of appellants, such as *pro se* appellants, due process of law and equal protection under the law, and are in violation of the statute which created the federal circuit courts of appeal. At a minimum, this Court should provide guidance to the circuits as to what cases and procedures are appropriate for unexplained, unpublished affirmances. If staff attorneys are employed, the staff attorneys should be required to provide a written rationale which addresses all issues which were raised by the appellant on appeal and which is published and has precedential value. Also, if the appeals courts affirm a published lower court opinion without comment, then the circuit court should be willing to stand by the lower court opinion and accord it the status of a circuit court precedent.

The role and duties of the federal circuit courts of appeal have been established by statute, 26 Stat. 826 (1891). The federal circuit courts of appeal do not have discretionary review. See 26 Stat. 826 (1891). See also McLish v. Roff, 141 U.S. 661, 666, and In Re Woods, 143 U.S. 202:

> ...the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice.

There is little case law with respect to the legal validity of the manner in which most district court cases are now being affirmed in brief, unexplained, unpublished decisions which are largely the opinions of staff attorneys rather than the judges. The essential deprivation of the right to a properly considered appeal is coming under increasing criticism by academics and the public. See *New York Times*, front page, March 14, 1999, "Caseload Forcing Two-Level System For U.S. Appeals" (Lodged materials 35-37). As the article points out, and as this case illustrates, appeals court decisions are becoming grossly incompetent, increasingly biased, and worse. Moreover, the manner in which appeals court decisions are being handled is in violation of federal law.

Nothing is being done about this travesty of justice because the district courts are happy to have minimal scrutiny and small chance of reversal,[10] and the circuit courts are not likely to criticize their own procedures. This Court is sympathetic to their caseload problem and has not yet granted review of any case in which a petitioner has questioned the wholesale affirmance procedures in the circuit courts.

Petitioner was able to locate one case with respect to the validity of the D.C. Circuit's particularly egregious summary affirmance procedures. In the case of United States v. Glover, 731 F.2d 41 (1984), a member of a three-judge panel, Judge Abner

[10] The power of district court judges is thereby greatly increased. Less accountability for district judges means a greater likelihood of bias and abuse of discretion as district judges realize they can throw their weight around with impunity. It also results in a larger number of lower court errors which are never corrected. Decreased quality in the circuit courts causes decreased quality in the district courts.

Mikva, filed a dissenting opinion to a decision to grant summary affirmance. He stated: "It is not necessary to tarry on the merits of this case. My concerns address the procedure used by this court in rendering a decision on the merits."

Judge Mikva then describes the D.C. Circuit's summary affirmance procedure. He states: "...when this court reviews a motion for summary affirmance, the procedure is indeed summary." He mentions the briefs that were filed in the case and continues:

> The papers were then referred to the motions panel. That panel, which convenes once a week, consists of three judges..., only two of whom physically meet to review the motions. At these meetings, held *in camera*, as many as ten or fifteen motions can be decided in one or two hours. Only if the two judges in attendance disagree...are the papers presented to the third "tie-breaker" judge.

He concludes:

> My dissent stems from a firm conviction that when this court summarily decides the merits of a case through the procedure described above, its actions undermine the integrity and general principles of the appellate process. The hastened nature of a summary affirmance belies every vestige of an appeal....
>
> Long tradition in the appellate courts of this country and of England has established the manner in which an appeal is treated. In sum, anything that looks so little like an appeal, contains so little of the accoutrements of an appeal, involves so little of the collegiality of an appeal, ought not to be considered an appeal. Whatever was done to the appellant in this case, he did not get an appeal from the decision of the trial judge...

Mikva acknowledges that there might be some "proper occasions for a summary procedure," but deplores the lack of guidelines to delineate what those occasions are.

Moreover, in addition to the points made by Judge Mikva, it is possible that unexplained, unpublished affirmances may afford room for improper influence upon those in the staff attorney's office. A layer of personnel, whose memos can greatly affect the outcome of a case, has now been placed between the appellant and the judges and their clerks. This staff attorney is not subject to the confirmation procedure, nor is the staff attorney's office closely supervised the way judges supervise their clerks. The staff attorney situation is ripe for improper influence on the outcomes of cases.

Dr. Polsby appreciates that burgeoning case loads have created an impossible situation for the courts. Overworked judges and their law clerks feel pressure to get rid of cases and may be all too tempted to trust the staff attorney's office to make their decisions for them. However, the solution to this problem should not be to deny appellants the right to a properly considered, reasoned appeal in complex cases such as this one.

In any event, the excuse that appeals courts are overworked does not apply to the Fourth Circuit. There are two vacancies on the Fourth Circuit which the Fourth Circuit says it does not need filled. Fourth Circuit Chief Judge Wilkinson was quoted on March 13, 1999, in the *Richmond Times-Dispatch* (see Lodged materials 38), as supporting Sen. Jesse Helms' proposal to eliminate the two judgeships from his court: "We can do more with less, and we are a great deal more efficient at a relatively smaller size," Wilkinson said.

Of course this is nothing but a transparent effort by Judge Wilkinson to keep personal control over the outcome of all cases in his court. Additional appointees might interfere with the Fourth Circuit tactic of calling *en banc* rehearings and having the anti-civil rights

majority reverse any panel having the temerity to rule in favor of a plaintiff in a civil rights case. (See Lodged materials 39-40 *The Washington Post*, Sunday, April 26, 1998, B5, "A Chance to Tip Scales of Justice," which describes the Fourth Circuit's liberal use of *en banc* rehearings to reverse decisions written by Democratic appointees).

The Fourth Circuit is perfectly happy to turn almost all its decisions over to staff attorneys and make sure that certain judges are chosen to "sign off" on certain cases. Meanwhile Judge Wilkinson, a former journalist, instead of writing opinions, can put the Fourth Circuit on auto-pilot with staff attorneys and spend his time writing books which foster his anti-civil rights ideology (See *One Nation Indivisible, How Ethnic Separatism Threatens America*, by J. Harvie Wilkinson III, published in 1997 by Addison-Wesley Publishing Company, Inc., while Dr. Polsby's Fourth Circuit appeal was pending.) Judge Wilkinson's books, along with numerous op-ed pieces, letters to editors and other writings, are designed to proselytize his personal views. This strikes petitioner as inappropriate for a federal judge.

It certainly makes petitioner feel extremely bitter and deprived of justice to know that her rights have been held hostage by a single individual who has taken it upon himself to decide which laws he chooses to enforce in a jurisdiction which comprises five of the fifty states in this country. He is entitled to his opinion, but he does not have the right to deprive an individual citizen of her rights under laws which were duly enacted by the elected representatives of the American people. Just as every citizen must obey the law, whether he agrees with it or not, so the judiciary must obey the law as well and enforce the law. A judge may not refuse to enforce the laws with which he personally doesn't agree. A judge who refuses to enforce the law is breaking the law. The president of the United States is not above the law. Neither is any judge. A judge is also supposed to be fair and impartial. A judge is supposed to put personal views and bias aside when dealing with a specific case. If Dr.

Polsby can prove that NIH violated Title VII of the Civil Rights Act and that her hard-earned medical career was destroyed as a result, no judge is entitled to deprive Dr. Polsby of equal protection under the law because he is philosophically opposed to that law.

Although petitioner is not entitled to review by this Court, the Court does have a duty to supervise the circuit courts of appeal. The Court should pay special attention to all Title VII cases in the Fourth Circuit. The Court has a duty to "rein in" the Fourth Circuit's anti-civil rights extremism. The Fourth Circuit is now well-known for refusing to enforce the Civil Rights Act, even, as is shown by this case, if it means complete defiance of the Supreme Court. Plaintiffs can not win cases they would win in any other circuit. (see Lodged materials 39-40), Dr. Polsby can not get justice because the events which destroyed her career and, in fact, her life, happened to have occurred in the Fourth Circuit.

The Court should also pay special attention to cases in which the appellant was deprived of the right to an appeal. Even though petitioner is not entitled to a review of her case by this Court, she was entitled to a proper review of her case by the Fourth Circuit. She was entitled to an appeal. She did not get one. If the Fourth Circuit's ruling on the merits of the claims dismissed before trial was not an intentional act in order to circumvent this Court, then it was the result of gross incompetence and dereliction of duty.

Even in this Court, which is acknowledged to have discretionary review, every petition is read and considered by individuals of the calibre and background of Supreme Court clerks under the supervision of the Justices. There is no separate staff attorney's office of the U.S. Supreme Court. Even if Dr. Polsby's petition is not granted, it is likely her case will have received more attention and proper consideration in this Court than the attention it got at the circuit court level.

V. If a crèche on the steps of a courthouse at Christmastime is a violation of the doctrine of separation of church and state

[See Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989)], then the presence inside a courthouse of all three branches of government is surely a violation of the doctrine of separation of powers. The improper influence of one upon the other, or the appearance of improper influence, violates the most basic principles upon which our system of government was founded.

The new federal courthouse in Greenbelt, Maryland contains the office of a U.S. congressman who was instrumental in having the courthouse built. He was also instrumental in the appointments of all three judges in the courthouse, including the district judge in this case, who is the wife of one of his closest personal friends, and the Chief Judge who is another close personal friend. The U.S. attorney for Maryland also has her office in the courthouse. She is the former chief aide of one of the U.S. senators from Maryland. The U.S. congressman and U.S. senator in question are both ardent NIH partisans.

VI. It is a denial of due process of law for a court to rule that Title VII provides the exclusive remedy for certain claims and then refuse to admit evidence on those claims on the grounds that the evidence is irrelevant to a Title VII case. Similarly, it is a denial of due process of law for the district court to exclude all evidence of widespread Title VII violations at NIH and then to conclude in its opinion that widespread violations could not be proved.

VII. A trial court may not exclude certain types of employment from coverage under Title VII simply because "scientific research is not the type of repetitive experience that lends itself to easy comparison within the framework of employment discrimination law."

CONCLUSION

Petitioner Dr. Polsby wrote this petition entirely on her own. Although she has learned some things in all her years of litigation, she is not a lawyer. She wrote this petition herself because the odds are so low of any given petition being granted and because the cost of professional legal help is so high. After the destruction of her medical career and the cost of fourteen years of litigation,[11] petitioner can not afford to have a lawyer prepare this petition.

However, should this petition be granted, it is likely petitioner's former counsel, the firms of Mayer, Brown and Platt, and Winthrop, Stimson, Putnam and Roberts, would represent her *pro bono* before this Court, as they have in the past. In any event, petitioner would do her best to obtain high quality professional representation in order to brief the Court with competency and to be represented properly at oral argument.

The questions raised in this petition are extremely important. They concern the fundamental right to an appeal of a district court decision. The unexplained affirmance of a flawed decision in district court, in this complex and lengthy case, was not proper. The questions raised also concern every citizen's constitutional right to due process of law and equal protection under the law. The circuit court has deprived petitioner of those rights by ruling on the merits of claims dismissed before trial and before completion of discovery and by adopting a philosophy of refusing to enforce laws with which it is in political opposition. The overall handling of this case since the beginning, intertwined with that of Robinson, is evidence of something seriously wrong in the Fourth Circuit.

[11] including administrative procedures

The Court must protect the right to an appeal and the rights of every citizen to receive equal and fair treatment in the justice system. Therefore, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

M. MAUREEN POLSBY, M.D.
Petitioner, pro se
3416 Livingston St., NW
Washington, DC 20015
202-363-6331

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1793

M. MAUREEN POLSBY, M.D.,

Plaintiff - Appellant,

versus

THOMAS CHASE, Dr.; IRWIN J. KOPLIN, Dr.; MARK HALLETT, Dr.; DANIEL R. WEINBERGER, Dr.; GIOVANNI DICHIRO, Dr.; MARINOS DALAKIS, Dr.; RICHARD E. CARSON, Dr.; MURRAY GOLDSTEIN, Dr., in his official capacity as Director of the National Institute of Neurologic and Communicative Disorders and Stroke; JAMES B. WYNGAARDEN, Dr., in his official capacity as Director of the National Institute of Health; DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Deborah K. Chasanow, District Judge. (CA-2344-DKC, CA-94-3078, CA-93-3857)

Submitted: September 29, 1998 Decided: October 21, 1998

Before WILKINS, HAMILTON, and LUTTIG, Circuit Judges.
Affirmed by unpublished per curiam opinion.

PER CURIAM:

M. Maureen Polsby, M.D., appeals from the district court's final order granting judgment in favor of the Defendants in her employment discrimination action under Title VII of the Civil Rights Act of 1964, as amended. With respect to Polsby's claims of discrimination occurring during her employment at the National Institutes of Health, our review of the record discloses no reversible error. Accordingly, we. affirm on the reasoning of the district court. Polsby v. Chase, Nos CA-88-2344-DKC; CA-94-3078; CA-93-3857 (D. Md. Mar. 29, 1996).

Polsby's claims regarding post-employment acts of retaliation were dismissed by the district court on the basis of this Court's decision in Robinson v. Shell Oil, 70 F.3d 325 (4th Cir. 1995) (en banc). The Supreme Court reversed this decision while Polsby's appeal was pending. See Robinson V. Shell Oil, 519 U.S. 337 (1997). Nevertheless, any error in applying the former standard was harmless as our review of the record reveals that the evidence failed to support her claims of post-employment retaliation. Accordingly, we affirm the dismissal of these claims as well. We grant Polsby's motion to supplement her informal brief, deny her motion to place her appeal in abeyance, and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 4, 1999

No. 96-1793
CA- 88 - 2344 -DKC
CA- 94 - 3078
CA- 93 - 3857

M. MAUREEN POLSBY, M.D.

Plaintiff - Appellant

v.

THOMAS CHASE, Dr.; IRWIN J. KOPLIN, Dr.; MARK HALLETT, Dr.; DANIEL R. WEINBERGER, Dr.; GIOVANNI DICHIRO, Dr.; MARINOS DALAKIS, Dr.; RICHARD E. CARSON, Dr.; MURRAY GOLDSTEIN, Dr., in his official capacity as Director of the National Institute of Neurologic and Communicative Disorders and Stroke; JAMES B. WYNGAARDEN, Dr., in his official capacity as Director of the National Institute of Health; DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

Defendants - Appellees

.....

On Petition for Rehearing and Rehearing En Banc

.....

The appellant's petition for rehearing and rehearing en banc, supplement to the petition and motion to disqualify the panel were

submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing, the supplement to the petition and the motion to disqualify and is of the opinion that they should all be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc, the supplement to the petition and the motion to disqualify the panel are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 88-2344

M. MAUREEN POLSBY, Plaintiff

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services, Defendants

Filed: February [7], 1990

MEMORANDUM OPINION

Presently before this Court is Plaintiff Dr. Maureen Polsby's ("Dr. Polsby") Motion for Leave to File First Amended Complaint pursuant to F.RC.P. Rule 15(a). The issues have been fully briefed. No hearing is deemed necessary. Local Rule 105.6.

Facts

Dr. Polsby was employed by the National Institute of Neurological and Communicative Diseases [sic] and Stroke ("NINCDS"), a division of the National Institutes of Health ("NIH") in Bethesda, Maryland, as a Medical Staff Fellow on a two-year appointment from July 10, 1983 to July 9, 1985. Several months after the expiration of her appointment, Dr. Polsby met with an Equal Employment Opportunity ("EEO") counselor, and alleged that she had received disparate treatment in "her work assignments and re-

search opportunities" during her tenure as a fellow at the NINCDS.

Subsequent to receiving the final EEO Counseling Report, Dr. Polsby filed an employment discrimination complaint with the Department of Health and Human Services ("HHS"), of which the NINCDS and NIH are part. Dr. Polsby's claims were denied by HHS on July 11, 1988, after finding that her allegations were unsupported by the record.

On August 10, 1988, Dr. Polsby filed a complaint with this Court alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000el-17. Dr. Polsby also set out seven common law tort claims essentially based on the same facts as the Title VII claim.[1] The Secretary of HHS, Otis R. Bowen, M.D., and nine employees of the NINCDS and the NIH were named as defendants.[2]

The Defendants filed a joint motion to dismiss with this Court. At that time Dr. Polsby represented herself *pro se*.[3] Following a hearing on the motion, this Court dismissed the common law claims and all of the defendants except for the Secretary of Health and Human Services. A scheduling order was issued on September 28, 1989, setting a discovery deadline of December 4, 1989, and a motions deadline of December 22, 1989.

On December 19, 1989, the Court received Defendant's Motion to Compel discovery. The motion was referred to the Honorable Chief Magistrate Clarence E. Goetz of this Court. On January

1. The other claims in the original complaint were for intentional infliction of emotional distress, negligence, defamation, tortious interference with contractual relations, fraud, negligent misrepresentation and conversion.

2. Louis W. Sullivan, M.D., succeeded Dr. Bowen as Secretary of HHS in early 1989.

3. Although Polsby was representing herself *pro se* during this phase of the proceedings, she admitted at oral arguments that she had received assistance from an attorney in preparing her case.

2, 1990, Dr. Polsby served a praecipe entering the appearance of counsel. She then filed this motion for leave to file an amended complaint in which she seeks to add the seven previously dismissed common law claims and a new claim of RICO.[4] The amended complaint renames the nine NIH employees previously dismissed from this case, along with one additional NIH employee. In light of this motion, the Court has deferred ruling upon Defendant's motion to compel.

Discussion

Dr. Polsby's Motion for Leave to File First Amended Complaint will be denied. A review of the proposed amended complaint reveals its claims to be almost identical to the claims previously dismissed by this Court on August 28, 1990. The only new claim is for RICO. Likewise, the factual allegations are substantially similar to those from which the previous causes of action were dismissed. The Court has been given no reason by the Plaintiff to alter the previous ruling dismissing the common-law claims.

Essentially, Dr. Polsby seeks only to refile that which has already been settled. As the government rightfully points out, an amended complaint should not be granted when it cannot withstand a new motion to dismiss. Dr. Polsby's proposed complaint cures none of the deficiencies of her claims which were previously dismissed. It would be futile to grant Dr. Polsby leave to file the amended complaint. See *Ward Electronics Service v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987); *California Architectural Building Products v. Franciscan Ceramics*, 818 F.2d 1466, 1472 (9th Cir. 1987), cert. Denied, ____U.S. ____, 108 S. Ct. 698 (1988). See also *Sandcrest Outpatient Services v. Cumberland County Hospital System, Inc.* 853 F.2d 1139, 1148-49 (4th Cir. 1988).

4. This motion was filed ten days after the December 22, 1998, motion deadline. However, the Court does not believe that the parties are prejudiced by having this motion considered dispite its untimely nature. *See Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.), *cert dismissed*, 448 U.S. 911 (1980).

Likewise under the "law of the case doctrine," this Court cannot allow Dr. Polsby to refile the same claims which were previously dismissed. See *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (J. Holmes); *Redfield v. Continental Casualty Co.*, 818 F.2d 596, 605 (7th Cir. 1987) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.").[5] The purpose of the doctrine is "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing litigation." 18 Wright, *Federal Practice and Procedure*, § 4478, at 788 (1981 ed.). The "law of the case doctrine" will not be enforced when the Court is convinced that its previous ruling is clearly erroneous and would promote an injustice. *Arizona v. California*, 460 U.S. 618, 460 n.8 (1982). Nothing before this Court leads it to believe that an error has been made.

The Court stands by its previous ruling in this matter. This is a case of federal employment discrimination. It is well settled that "the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment" *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976). Accordingly, Dr. Polsby's Motion for Leave to File First Amended Complaint is denied. Defendant's pending Motion to Compel discovery will again be referred to Chief Magistrate Goetz for final determination. It will be so ordered.

2/7/90
Date

/s/
John R. Hargrove
United States District Judge

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5. The "Law of the case doctrine" is usually used in governing a case which has been remanded after appeal. However, the Court sees no reason why the doctrine should not apply in this situation where a party seeks to reinstate matters of which the Court has already disposed.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M. MAUREEN POLSBY, M.D.	:
	:
	: CONSOLIDATED
v.	: Civil Action No. DKC 88-2344
	:
DONNA E. SHALALA, Secretary	:
DEPARTMENT OF HEALTH and	:
HUMAN SERVICES	:

MEMORANDUM OPINION

It is difficult under any circumstances to try a case based on events more than a decade old. Differences often occur in perception when two people observe the same event. The normal frailty of human memory heightens the chance that descriptions by two witnesses will differ, particularly when the event is recalled months or years later. The filtering of recollection through the prism off subsequent events can further compound the obstacles to accurate recitation. Those are some of the typical hurdles to ascertaining facts based on eyewitness testimony. The task changes dramatically, however, when witnesses are not honestly trying to recall events, but rather are willing to construct recollections to suit a present agenda. In this case, accurate factfinding about what did happen is difficult because of the long time lag between events and trial. It is relatively simple, however, to conclude that certain things did not happen and, for that reason, the court will find against the Plaintiff.

This action is an employment discrimination case brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. M. Maureen Polsby, Plaintiff, has sued the Secretary of Health and Human Services, contending that she was discriminated against on the basis of her gender during her medical staff fellowship at the National Institute of Neurological and Communicative Disorders and Stroke (NINCDS), Experimental Therapeutics Branch (ETB), from 1983 to 1985. Originally filed in 1988, this case has had a somewhat tortured history.

After an initial skirmish over the proper defendants and discovery disputes, plaintiff filed her first appeal to the Fourth Circuit. Upon the dismissal of that appeal, the Defendant filed a motion for summary judgment, contending that the action was barred by Plaintiff's failure to have sought counselling within 30 days of the alleged discrimination and that Plaintiff could not make out a prima facie case of retaliation. On November 26, 1991, Judge Hargrove granted the Defendant's motion on the limitations issue. Plaintiff's motion for reconsideration was denied and Plaintiff appealed. The United States Court of Appeals for the Fourth Circuit affirmed the judgment in a published opinion, Polsby V. Chase, 970 F.2d 1360 (4th Cir. 1992). That court upheld Judge Hargrove's determination that Plaintiff's claim was time-barred, and also held that the allegedly retaliatory acts that took place after her employment were not cognizable under Title VII. The Supreme Court granted Plaintiff's Petition for Writ of Certiorari. The Defendant conceded that the summary judgment record was not conclusive on the limitations/notice issue, so the Supreme Court vacated the decision of the Fourth Circuit and remanded the case to that court. Polsby v. Shalala, ___ U.S. ___, 113 S. Ct. 1940 (1993). The Fourth Circuit, in turn, vacated the judgment of the district court and remanded the case to this court for further proceedings. The case was reopened on June 21, 1993.

After the remand, Plaintiff moved for partial summary judgment on the issue of her notice of the thirty-day limitations period, and that motion was ultimately granted by the undersigned. She

also sought leave to amend her complaint and filed action 93-3857, now consolidated. Both cases were reassigned to this member of the bench on April 25, 1994, and the cases were consolidated on March 8, 1995. Further motions to dismiss and to amend were filed and resolved, including whether the post-employment claims were actionable. In an opinion issued in April 1995, the undersigned determined that some post-employment claims were actionable, based in part on the panel decision in Robinson v. Shell Oil, No. 93-1562, 1995 WL 25831 (4th Cir. Jan. 18, 1995). The panel decision was vacated when the court granted rehearing en banc. The ultimate decision of the Fourth Circuit in Robinson v. Shell Oil, 70 F.3d 325 (4th Cir. 1995) (en banc), again held that Title VII is limited to claims of applicants and employees, and does not extend to former employees. Thus, all of Plaintiff's post-employment claims again were dismissed. The remaining claims, all falling under Title VII prior to the Civil Rights Act of 1991, were tried to the court in late January and February, 1996.

Plaintiff claims that certain opportunities and benefits of a medical staff fellowship were denied to her because of gender discrimination. She claims that she was wrongfully denied the opportunity to pursue a third (and subsequent) year as a National Institutes of Health (NIH) research physician, mentoring, and the opportunity to do independent research. In addition, she claims that she was disproportionately assigned routine duties and that her torticollis research was misappropriated. The Defendant defends on a variety of grounds, including the contention that some aspects of the claimed discrimination are not actionable since they do not relate to a term, condition or privilege of employment

It is well past time to put this case to rest. The continuing animosity among the participants and the shifting sands of Title VII law have delayed resolution long enough. All parties had a full opportunity in court to present evidence on the remaining issues

Prologue

While the employment events that brought Plaintiff to court took place between July 1983 and July 1985, the flavor and even-

tual resolution of this case stem from the months that preceded Dr. Polsby's employment. In the differing accounts of those months, and in my perception of the credibility of the witnesses, the die is cast.

Maureen Polsby, then in the third year of her neurology residency at Tufts New England Medical Center spoke to Dr. Thomas Chase, Chief of the Experimental Therapeutics Branch, NINCDS, at one of the annual meetings of neurologists held in Boston. She recounts being "recruited" by him and offered a career in Position Emission Tomography (PET) research. Dr. Chase recalls nothing of the kind, but acknowledges that he often spoke to hopeful medical students (including interns and residents) about research opportunities at NIH. Plaintiff recalls visiting NIH in December, 1982. Dr. Chase insists that Plaintiff's interview on campus was not until February or March, 1983. They both recall being at a meeting of the American Academy of Neurology in San Diego in the spring of 1983. She maintains that he made a "pass" at her, which she rebuffed, and forever after she suffered the consequences. He categorically denies that he ever did so. Dr. Norman Foster, another medical staff fellow, remembers being surprised when introduced to Plaintiff as the next incoming fellow at that meeting. Dr. Chase is certain that Dr. Foster met and interviewed Plaintiff at NIH before that meeting. Plaintiff agrees with Dr. Chase that she and Dr. Foster met at NIH, but she places the visit in December.

These recitations of the events during the winter and spring of 1982 to 1983 are a combination of innocent misrecollection and outright fabrication, sprinkled with a few kernels of truth. For the most part Plaintiff's recollection is at least highly suspect because it is part of her after-the-fact rationalization for a failed research fellowship. At its most sinister, Plaintiff's tale is an attempt to punish Dr. Chase and NIH for a belief that cannot otherwise be proved that gender discrimination was widespread at NIH. Dr. Chase, as well, has convenient recall and appears at times to tailor his recollection to suit present needs. While he is not entirely credible, the burden of persuasion is not his. Dr. Foster, and the other witnesses,

are on occasion more certain than they ought to be about events that were less meaningful to them at the time. Collectively, though, they help to set the stage for resolution of the events.

Plaintiff claims not only that Dr. Chase initiated the discussion of her joining the NIH "family," but that he, unbidden, offered her a career as a PET researcher, beginning with a position as a staff fellow at a salary of $36,000, with no routine duties. She later admitted, however, that she was unfamiliar with all the different titles and perks for fellowship positions.

Plaintiff's recollection of the first meeting in Boston is almost laughable. Realistically, Dr. Chase could do no more than encourage the third-year resident to apply for a fellowship and perhaps encourage a visit to NIH. If the events had taken place as described by Plaintiff, the situation upon arrival would have been a shock. A salary of $30,000 along with night call duty would have set off alarm bells. And Plaintiff would have done something at the time. The fact that she did not even inquire about the low salary and the clinical responsibilities belie her claim. In truth, Dr. Polsby did not believe she had been promised anything more than a fair chance to apply at that Boston encounter. Her after-the-fact rationalization that the lower salary and changed title was the first act of retaliation is totally without support. She should acknowledge that physicians who come to NIH to do clinical research typically begin as medical staff fellows with a two-year appointment and that in 1983 the salary was $30,000. She certainly was not treated differently than other entering medical staff fellows in title and pay.[1]

It must remain a mystery as to precisely when and how Plaintiff came to be interviewed by Dr. Chase. No paperwork survives that memorializes the chain of events and the participants have unreliable memories. Dr. Polsby did come to NIH for an interview, but it was likely in 1983, as suggested by the surviving

[1]plaintiff claims that the $2,000 salary increase at the end of her first year is evidence that she was performing well. The Defendant's evidence overwhelmingly supports the view that the increase in salary was routine. (See Defendant's Exhibit 6).

documents, and not December 1982 as claimed by Plaintiff. (See Defendant's Exhibits 58 and 62) Neither Dr. Chase nor Plaintiff utilized the match procedure that year, so the invitation to interview for the position had to be arranged directly between Dr. Chase and Plaintiff. All agree that Plaintiff probably had been offered the position by the time of the San Diego conference in the spring. The paperwork formalization of the appointment followed.

Plaintiff's account of her treatment by Dr. Chase at the conference in San Diego simply is fabricated. Plaintiff says that she deliberately lagged behind in a classroom, aware that Dr. Chase was lurking in the doorway, waiting for her. Why was she already avoiding the scientist who had promised her a research career? She wasn't. It did not happen. She claims to have been alarmed by his suggestion that she come to his room to drop off her books before dinner. Why didn't she simply leave them at the reception desk and tell Dr. Chase she would wait for him in the lobby? She admits to being a somewhat savvy female in the midst of an overwhelmingly male setting, yet she helplessly went along with Dr. Chase's suggestions. Not for a moment do I find her account credible. After the failed so-called pass, Plaintiff says she avoided Dr. Chase for the rest of the conference, yet she says she expected that "bygones would be bygones." Which way was it? All in all, I simply do not believe that Dr. Chase made an unwelcome and inappropriate "pass" at Dr. Polsby at that or any other time. Unfortunately, I believe that the incident was concocted in order to give spice to her later claims that Dr. Chase treated her differently than male fellows hired to do research in the ETB. Thus, the ensuing events must be assessed in light of my finding that Plaintiff's precipitating event did not occur.

Employment

The essence of Plaintiff's testimony about her employment follows. Plaintiff began her employment at NINCDS on July 10, 1983. According to Plaintiff, shortly before her employment began, Dr. Chase told her that he could not "get away" with making her a staff fellow at $36,000 per year and she would have to settle for being a medical staff fellow, at $30,000 per year. Dr. Polsby claims

that she was assigned all the routine duties that had previously been divided between the two first year fellows. Dr. Jorge Juncos, who also started in July of 1983, worked full-time in "his" laboratory on the other side of the clinical center and did not pick up any of the clinical duties. Consequently, Plaintiff had to see all the patients who had been seen by former fellows and do all the screening of referrals, including fielding telephone calls from neurologists all over the country concerned about patients with advanced Parkinson's disease who were hoping for new treatments. She presented the patients at weekly clinic meetings so the others could decide if any particular patient was suitable for their projects. She had the particularly difficult task of explaining to Parkinson's patients that, due to the completion of a study, neither treatment nor medication would continue to be available through NIH. (See plaintiff's Exhibit 37). Plaintiff also claims that she was assigned the task of reviewing grant applications early in her fellowship, a job not suitable for a first year fellow, but that she did not mind.

Plaintiff was assigned to perform data analysis on PET scans of patients with Tourette's syndrome. She received data sheets and was expected to perform calculations by hand. She had to read the scan and record the metabolic rates, a tedious endeavor. Performed by this method, it took one hour per slice, and there were seven or eight slices per scan. Thus, analysis took an entire day for one scan. The numbers were then punched into a tape, taken to another building, and run on a computer. She claims to have designed a system for automated cortical mapping, using the concept of Robert Kessler from the Nuclear Medicine Department, and her computer skills. This system shortened the time necessary to ten minutes per slice, and one hour per scan. Then the results were sent over the telephone lines to the computer, reducing the chances for error. Dr. Chase was very complimentary. Dr. Polsby, however, had difficulty getting her own hard disk, an essential resource for the project, because Dr. Chase had refused to authorize it. Eventually, she borrowed one from a colleague. Male fellows doing PET research appeared to have hard disks assigned to them.

Dr. Allen Richard Braun arrived at the ETB in July 1984, but Plaintiff's duties did not change. Plaintiff claims that Ms. Gillespie told her that Dr. Chase said that Plaintiff had to continue to do all the first-year tasks. Dr. Braun worked full-time in his laboratory. When she asked Dr. Chase about this arrangement, he reportedly said that he had promised Dr. Braun the opportunity to do his own research to convince him to accept the position, so that was the way things had to be. Around the same time, Dr. Foster left the branch. He had nominally been in charge of the ward service. Instead of giving this designation to Plaintiff, Dr. Juncos was appointed ward chief, even though he had not been seeing patients for the entire year.

Plaintiff claims that all of her research ideas were turned down by Dr. Chase. She wanted to study Progressive Supranuclear Palsy (PSP) "comprehensively," including conducting MRI scans. Dr. Chase said "no" without providing an explanation. Dr. DiChiro heard about the patients and agreed to use his MRI slots for them. The study showed clear abnormalities on the scans, results that were immediately publishable. Dr. Polsby wrote an abstract and a platform presentation. (plaintiff's Exhibits 26-29). When Dr. Chase saw the abstract without his name as an author, he insisted that it be added.

Plaintiff described the various research projects concerning Sexual Dimorphism, Revascularization of Stroke Patients, Criminality, and Alzheimer's and Herpes Simplex which she proposed to Dr. Chase, but which he refused to allow to proceed. While she tried to show the scientific legitimacy of conducting some of these research projects, this information is irrelevant. Research in the ETB was under Dr. Chase's control and his decisions on the allocation of resources and the direction of research cannot be challenged on the ground that others found the research ideas valid.

Plaintiff developed a broad interest in studying patients with Spasmodic Torticollis (ST). When she began, there were a couple of ST patients in the clinic. Over a period of months from late 1983 through November 1984, plaintiff claims she actively recruited additional patients until the total rose to twenty. She participated in

early meetings of a Support Group and later served on its Board of Directors. In the process of screening these patients, Plaintiff learned that some had been on Elavil and it appeared that many had personal or family histories of psychiatric problems, including manic depression, schizophrenia, and alcohol abuse. She wondered whether there was a connection: was ST a variant of manic depressive disorder? Without a specific protocol, plaintiff put five patients on Elavil. One dropped the medication because of side effects after a few days, one experienced no difference in symptoms, but three reported that they thought they felt better. Plaintiff started telling everyone about her theory of the link between neurology and psychology. She wanted to do a double blind study, for which an approved protocol would be needed.

In the summer of 1984, Dr. Weinberger, the nominal head of the outpatient clinic, told Plaintiff about a Fogarty Fellow coming from Germany, a psychiatrist coming for training in neurology. Dr. Weinberger thought that Plaintiff's idea presented a good project for him to work on. Dr. Deiter Naber arrived, and Plaintiff spent several weeks explaining neurology to him, teaching him to do neurological examinations, and introducing him to ST patients.

At some point, Dr. Weinberger told Plaintiff that he wanted to try buspirone on the ST patients. Although Plaintiff was not sure that it was a good idea, she agreed to let the patients decide. All agree that Plaintiff was asked to be a rater on this study. Dr. Weinberger and Dr. Naber thought Plaintiff knew she was to be a rater, but then failed to show up for the first day of the study.[2] Her recollection is that she turned down the assignment because of her other work and that it was not a problem.

[2]There are two "blinded" raters for each double blind study, each of whom rates all the patients. It is imperative that the same people perform the rating function throughout the study in order to insure uniformity. A third "unblinded" researcher administers the prescriptions. Dr. Weinberger was the "unblinded" researcher, and Dr. Naber and Plaintiff were supposed to be the "blinded" raters. When Plaintiff failed to appear, Marge Gillespie was assigned the task of being the second rater.

Plaintiff thought the Elavil protocol would be written by Dr. Weinberger, Dr. Naber, and herself, but she was unsuccessful in arranging a meeting of the three of them for that purpose. The other two were only on campus for clinic two half-days per week, were at St. Elizabeth's the rest of the time, and did not return Plaintiff's calls. At some point in the early fall of 1984, while in the clinic secretary's office, Plaintiff saw a typed protocol for the use of Elavil for ST patients. Dr. Chase was identified as the principal investigator, with Dr. Naber and Dr. Weinberger as associate investigators. Dr. Polsby's name was not listed. Plaintiff called Dr. Weinberger, and was able to reach him this time. He said the protocol was just a draft, and the omission of her name was merely an oversight. Eventually, her name was added as the last investigator. Plaintiff's Exhibit 62 is the draft with her name that she claimed she received from Pat Cappolella.[1] Later, Plaintiff claims that Ms. Gillespie told her Dr. Chase "shelved" the project.

In November 1984, Plaintiff saw an article that referred to ST research being done, with no mention of Plaintiff. (Plaintiff's Exhibit 61). After seeing the article, Plaintiff complained to Dr. Chase about Dr. Weinberger and Dr. Naber "walking off" with her ST project. According to her, Dr. Chase said he did not care because his name would go on the publications regardless of who did the research and he did not want to get involved in squabbles. He also did not want Plaintiff working on her own projects because she had too much else to do. Dr. Chase did nothing. Plaintiff says she then spoke to Dr. Kopin who initially appeared sympathetic. After speaking with Dr. Chase, however, Dr. Kopin told Plaintiff there was nothing he could do, that Dr. Chase could treat his fellows in any manner he chose.

Plaintiff persisted and again spoke to Dr. Kopin who became interested in the incident when Dr. Chase insisted that his name

[1]The origin of this document is a mystery. No one admits to writing the draft or typing it. Some witnesses tried to identify the typeface, concluding that it probably was not typed at St. Elizabeth's, but may have been typed at the ETB. Dr. Weinberger denies drafting it, Dr. Naber is unsure. Plaintiff denies being the author. Dr. Chase denies ever seeing it.

go on the PSP abstract. Shortly thereafter Dr. Chase angrily expressed his distress about Dr. Polsby's report to Dr. Kopin, who finally understood that things had completely broken down. Dr. Kopin, Dr. Di Chiro and Plaintiff arranged the transfer. Plaintiff agreed to the transfer in December 1984 expecting to be able to continue her ST and PSP work. Dr. Hallett told her she would have a "clean slate," and if things went well with Dr. Di Chiro, she could extend her fellowship.

The transfer was not official until February 1985, although Plaintiff switched branches in December. She was able to continue seeing her ST and PSP patients in clinic in January, but eventually experienced difficulty in getting a new referral admitted. (Plaintiff's Exhibits 43 and 43A.)

A single project was assigned to Plaintiff in Dr. Di Chiro's section: Amyotrophic Lateral Sclerosis (ALS or Lou Gehrig's disease) and PET. The scans had been done two years previously and a previous fellow had attempted data analysis. A paper had been submitted to Science, (Plaintiff's Exhibit 45), but had been rejected and the project was inactive. Plaintiff's task was to quantify the assumed decrease in metabolic rates.

The problems Dr. Polsby encountered included being handed an incomplete file, not getting needed assistance from PET technicians, and the inability to find scans of normal controls. Eventually she got the data and performed the analysis. She concluded that there was no difference between the patients and the controls. The lesions reported were non-existent. She presented her conclusions to Dr. Di Chiro near the end of her fellowship year. He got extremely angry, said that Plaintiff had done it wrong and her data was worthless. She asked him to go over the data with her to see where the mistake was, but he said no, he was not going to waste his time. She again asked for that kind of help from him as her mentor, offered to stay two more weeks, unpaid, to be sure of the results. Dr. Di Chiro said no, that a Japanese researcher was coming in as a new fellow, and he would start over. Plaintiff explained the project to Dr. Hatazawa and gave him the data and her results. She later

saw the publication with what looked to her like the same conclusion she had reached. (Plaintiff's Exhibit 46).

Plaintiff's fellowship terminated on July 9, 1985, at the end of the initial two-year appointment. Plaintiff claims that she believed from the outset that she was promised a "career" or at least three years at NIH and discussed her desire to stay for a third year at the time of her transfer to Dr. Di Chiro's section. Dr. Hallett supports her in this recollection.[4] She also asserts that she made oral requests for an extension prior to the written request to Dr. Kopin dated June 28, 1985. (Defendant's Exhibit 21).[5]

Testimony of Other Witnesses

A brief description of the testimony of each of the other witnesses, some with comments on credibility, ,will assist in understanding the reasons for the court's ultimate conclusion.

Dr. Thomas Newell Chase

Dr. Thomas N. Chase, then Chief of ETB, cannot recall when he first met Plaintiff, but does remember that he interviewed her at NIH around February or March, 1983. He did not participate regularly in the match program.and this interview was not part of that process. He thinks a prior fellow had made a surprise announcement that he was leaving at the end of that academic year, so he was looking somewhat late in the year for a replacement fellow. Typically, a position beginning in July is filled by January. By February or March, there would be less competition because the best candidates would have settled into other jobs. Nevertheless, he always had applications on his desk so he does not think Plaintiff was the only person available.

It is not unusual for Dr. Chase to discuss fellowships with aspiring researchers at national meetings and to encourage applica-

[4]Neither Dr. Di Chiro nor Dr. Kopin recall any such discussion, and both testified that there was no question in their minds that Plaintiff's stay with Dr. Di Chiro would end within six months.

[5]This memorandum to Dr. Kopin is not a request for a third year of fellowship training. It is a request to remain nominally on staff pending new employment.

tions. The precise names of fellowship positions and their salaries are not normally within his knowledge. Fellows have no independent research; an individual must be tenured before earning that privilege. Very few fellows, about five to ten percent, are invited to stay on in career track positions. Therefore, it would be inappropriate and manipulative to represent to an incoming fellow that such a position was assured. In 1982-83, Dr. Chase did not control the PET scanners and could not promise anyone access to that resource. His policy was to offer an initial appointment for two years. He never offered a three-year fellowship from the start of employment.

Before extending an offer to plaintiff, Dr. Chase spoke with Dr. Brady and Dr. Munsat, both of whom had previously worked with her. Dr. Munsat said, somewhat ambiguously, that he and Plaintiff had come to a parting of the ways, that Plaintiff had not done well as a clinician and had been under stress. The practice of neurology was too much for her, and maybe research would be good for her. Patient contact at NIH was much less stressful in contrast to hospital work where life and death decisions were common.

Dr. Chase described training in medical research as a type of apprenticeship. "Mentor" is a term now in vogue but not used in 1982-83. He acknowledged knowing Plaintiff had a problem getting along with others, so he asked her to chair a weekly meeting to screen patients into protocols. His goal was to force her to hear about the work being done by others. He recalls getting continuing and increasing complaints that plaintiff was not working full-time and could not be found when she was supposed to be available. Nurses and nursing supervisors called him, particularly in the morning, when they couldn't find the physician assigned to a particular patient. In contradiction to Dr. Foster's testimony, Dr. Chase recalls him complaining about Plaintiff's medical competence as well as about her administrative competence and punctuality.

He also acknowledged that Plaintiff's research product was zero. He does not know why he failed in getting her started in the process of learning to do research. All of her research ideas were

not feasible for one reason or another. He cannot recall how often they met.

Dr. Chase considered himself the principal investigator on all clinical research in his branch and stated that NIH policy required a branch chief or other tenured researcher as principal investigator. When patients in a study came from his branch, he was the guarantor of the diagnosis. Fellows rotate, and a tenured researcher is needed for continuity and to be responsible for the data base. Dr. Di Chiro is tenured, but not a clinician who could not make diagnoses. He could guarantee the MRI reading. In his experience, fellows usually want Dr. Chase's name on their publications.

By December, it became apparent to Dr. Chase that Plaintiff was not performing well as a clinician, researcher, or government employee, and it was time for her to move on. He recalls a specific incident on rounds with Dr. Foster which constituted unacceptable insubordination. Dr. Chase decided he had to remove Plaintiff from any inpatient care responsibility. He thought she could perform in the outpatient clinic where patient safety issues were less serious. Then she had problems there with Dr. Weinberger including Plaintiff not showing up for her duties, not serving as a rater, and not producing work product. Dr. Chase spoke to Dr. Hallett, and the transfer was arranged. Dr. Polsby did not complain to him about her treatment, except about his name on the PSP abstract, while she was at NIH.

In a sense, Dr. Chase admitted treating Plaintiff differently than other fellows. In hindsight, he states that she was "fragile," had "special needs," and required more of his time because she was not progressing. He denied, however, that any special treatment was based on gender. As stated at the outset of the opinion, parts of Dr. Chase's recollection are transparently defensive products of after-the-fact rationalization. His criticism of her work and habits has become more extreme and the justifications for some of his own conduct are strained. I remain persuaded, however, that he was not engaged in gender discrimination with regard to employment decisions affecting Dr. Polsby.

Dr. Mark Hallett

Dr. Mark Hallett, who testified both by deposition and in person, returned to NIH in April of 1984 as Clinical Director of NINCDS. He was never Plaintiff's direct supervisor, but was a second level supervisor after Dr. Chase and Dr. Di Chiro. He played a major role in Plaintiff's transfer, having learned in many meetings with Plaintiff that she was very unhappy with Dr. Chase and he with her. Dr, Hallett tried to arrange a plan to enable Plaintiff to develop her research skills, to give her a "fresh slate" to begin to accomplish medical research. Dr. Di Chiro invited Plaintiff enthusiastically. One purpose of the transfer was to give Plaintiff a second chance to perform well. Dr. Hallett also knew Plaintiff was interested in a third year, but that Dr. Chase would not offer her that opportunity. While he did discuss the possibility of a third year with Plaintiff, Dr. Hallett was in no position to promise her one.

Dr. Hallett described his knowledge of Plaintiff's performance. In May 1984, she refused to sign an application for clinical privileges because of a standard question concerning permission to inquire of other institutions. (Defendant's Exhibits 4 and 11). He had never had anyone else object to it. As clinical director, he became aware of problems in Plaintiff's clinical duties, in part through personal observation and in part from others. He observed lapses in her medical performance, received telephone calls from patients, received copies of memos concerning missing medical records, and heard complaints from Dr. Chase and others. He met with Plaintiff many times from April to December 1984 and told her that her patient care and attendance needed improvement. Plaintiff expressed concern over her fellowship with Dr. Chase and her feeling of exclusion from some projects. He tried to act as a mediator on some issues and recalls speaking with Dr. Weinberger about ST research. His contact with Plaintiff diminished after her transfer.

Dr. Irwin Jerome Kopin

Dr. Irwin Kopin has been at NIH since 1957. In July 1983, he replaced Dr. Chase as Scientific Director of NINCDS. Dr. Kopin cannot recall when he first met Plaintiff, but recalls that she spoke to

him after about one and one-half years as a fellow to request another position. She suggested Dr. Di Chiro's section because she wanted to analyze PET scans and Dr. Di Chiro had expertise in that area.

Dr. Kopin was involved in the transfer mechanics because he ultimately controlled the resources. Plaintiff's transfer involved a temporary transfer of the medical staff fellow position from Dr. Chase to Dr. Di Chiro for six months. To his knowledge, there never was an issue of Plaintiff's tenure being extended for a third year because the slot would revert to Dr. Chase's branch after six months. He would not have any reason to extend her appointment, and Dr. Di Chiro would not have the position after the six months. Dr. Kopin probably had a slot or two "in reserve" that could have been activated had everyone agreed that it was a good idea to do so. The issue was not discussed regarding Plaintiff because no one other than she raised the issue. At the time of her transfer, it was already clear that her fellowship would end after two years.

Alfred L. Salas

Mr. Salas described the personnel system for medical staff fellows at NIH during 1983 and identified some records. His testimony and the exhibits will be referenced where relevant.

Dr Norman Louis Foster

Dr. Norman Foster joined NIH in July 1981, in the ETB. His initial appointment was for two years. After one and one-half years, Dr. Foster asked Dr. Chase if he could stay on for another year to do basic laboratory research. Dr. Chase said the third year would be possible and that he could work in the lab with no direct clinical responsibilities except to try to help complete some studies. He would, however, be expected to supervise Plaintiff and the Fogarty Fellows in the inpatient ward. Dr. Foster recalls that Plaintiff had not completed her residency, and thus was not board-eligible, so that he would have to supervise her regarding patient care.

As ward supervisor for the inpatient clinic, he began to conduct rounds on a daily basis, Monday through Friday. He expected Plaintiff to attend. Although he found no fault with Plaintiff's judg-

ment or medical care, he had concern for her lack of responsibility. She would not dependably appear, so he had to do rounds by himself. She was tardy or absent several times a week on a regular basis. He was less directly involved with Plaintiff on the outpatient clinic where they were in parallel positions. At times he had to see patients scheduled to be seen by Plaintiff because of her absence.

Within the first two months of Plaintiff's fellowship, Dr. Foster claims to have told Dr. Chase that Plaintiff was not taking responsibility for patient care and recommended that Dr. Polsby be discharged. Dr. Chase was reported to have said it was too difficult in the NIH system to fire Plaintiff and advised Dr. Foster to have Dr. Juncos help out with patient rounds.

Dr. Peter Lewitt

Dr. Peter Lewitt was at NIH from July 1980 to July 1983, leaving just as Plaintiff arrived. He recalls talking with her during an informal orientation process. After he left and went to the Detroit-Lafayette Clinic, he sent an idea back to Dr. Chase in the hope that NIH would assign someone as a principal investigator there on the droperidol study described in Defendant's Exhibit 49.

Dr Jorge Juncos

Dr. Jorge Juncos, now an associate professor of neurology at Emory University, was a medical staff fellow in Dr. Chase's branch in 1983. He worked primarily in the lab at the beginning, except for one morning a week at the movement disorders clinic and the normal on-call duty he shared with others on a rotation basis. Initially, he was told what day he would take over at the clinic when a prior fellow left, and he scheduled his lab work around that day. Later he assumes he could have changed the day if he wanted.

After he was there for a year, Dr. Chase asked him to take over the responsibility from Dr. Foster for supervising the fellows on the inpatient ward for patient care issues. In that position, he conducted morning rounds and remained available the rest of the day although physically in the lab. Dr. Chase did not tell him why he was selected for this assignment or whether there were any problems with Plaintiff. He did not have much contact with Plaintiff

after this new assignment, although she let him know of her objection to his selection. Plaintiff believed she was more qualified because she had seen more patients than he had in the first year. He had no supervisory responsibility over Plaintiff whose inpatient duties dwindled to nothing.

As of July 1984, Dr. Juncos became the first "target" of Ms. Gillespie when calls came in or there were emergency calls concerning patients of other doctors. This task took from half an hour or so on a good day, to two hours on a bad day. He could delegate some of the return telephone call work to Ms. Gillespie, but he had to decide the proper course of action. Patient care is a necessity—part of the ability to do clinical research depends on patient loyalty.

Around July 1985, Dr. Juncos' animal work in the lab slowed to a trickle, and he took on more responsibility for mentorship and clinical research. This shift in emphasis was primarily his idea rather than Dr. Chase's. Dr. Juncos wanted to be more marketable and felt increasing his clinical experience would help. He ended up staying for four years with a few months for transition of responsibilities to another researcher and the making of arrangements to go to Paris for a year and then to assume a position at Emory.

Dr. Allen Richard Braun

Through the matching process, Dr. Allen R. Braun joined the ETB, NINCDS, as a medical staff fellow in July 1984 and left in July 1986, to join the Department of Nuclear Medicine. Plaintiff was not a major presence in the fifth floor lab where he worked. He described the process of discussing research ideas with Dr. Chase. His opportunity to do laboratory research full-time during his first year, followed by a year of clinical research, was rare. Most fellows get a mix of lab and clinic experience throughout their fellowships.

Patricia Cappolella

Ms. Patricia Cappolella was the patient care secretary in the ETB. Her duties included logging in referrals from private physicians, routing them to the appropriate physician, bringing them to

the weekly patient care meetings, and setting up appointments for screening. She also typed various materials for medical staff fellows, such as manuscripts, protocols, and travel vouchers. She attended the outpatient clinics whenever they were held and was the timekeeper for employees of the ETB.

Plaintiff was one of the medical staff fellows for whom she was responsible. Plaintiff was late for clinic several times, making patients wait for her arrival. When Ms. Cappolella expressed concern to Dr. Chase about Plaintiff's time and leave records, he told her not to worry about them, that professional people worked nights and weekends, and that issues of patient care were his responsibility.

Ms. Cappolella has no recollection of typing Plaintiff's Exhibit 62, which looks like a draft to her because it is double spaced, or being asked to put Plaintiff's name on it. She did not have any responsibility to do any typing for Dr. Weinberger or Dr. Naber.

Marjorie Gillespie

Marjorie Gillespie has been employed at NIH for twenty years as a research nurse. She met Plaintiff when she came to the ETB and described both the physical layout of the various areas and the general operating procedures. Ms. Gillespie recalls hearing from other nurses that they had problems reaching Plaintiff and that she did not come to clinic. When Ms. Gillespie succeeded in reaching Plaintiff, sometimes at home or by page, Plaintiff provided various reasons for her absence including that her dogs were loose and that the burglar alarm went off. If unsuccessful in finding plaintiff for a missed clinic appointment, Ms. Gillespie would see the patient herself. Plaintiff was supposed to be a rater on the buspirone study, but Plaintiff was not there on the first day when the patients appeared. Ms. Gillespie was substituted as a rater. Rating is not "gofer" work, although no one likes doing it. It takes time and is tedious, but everyone has to do it, and the doctors usually do it for one another. Because there are no interns or medical students at NIH, everyone has to do routine tasks.

Other Researchers at ETB and ST patients.

Dr Daniel Weinberger

Dr. Daniel Weinberger has been at NIMH since 1977. When Dr. Peter Lewitt was leaving in 1983, Dr. Weinberger volunteered to see patients in the movement disorder clinic so that his neurology skills "wouldn't evaporate." Dr. Chase accepted the offer, and Dr. Weinberger started going to clinic. He made it to the Thursday afternoon clinic regularly, and to about every third Tuesday morning clinic. Dr. Weinberger agreed to see the patients no one else wanted or needed to see and inherited the buspirone study from Dr. Lewitt.

Plaintiff was a co-worker in the clinic whom he met at a regular clinic meeting. He did not have any supervisory responsibility for her, although he tried to be helpful. Dr. Chase told him to consider himself Director of the Clinic, a title presumably known only to the two of them.[6] He discussed Plaintiff's interest in seeing ST patients and in testing Elavil. Dr. Weinberger offered to help write the protocol, but Plaintiff never asked for help. He never saw the draft protocol that is Plaintiff's Exhibit 62 until a month before trial during trial preparation. The typeface on this document is not like those used at St. Elizabeth's where all of his protocols were typed. Dr. Naber, too, would have had protocols typed at St. Elizabeth's, not at the ETB.

Dr. Dieter Naber also attended clinic sessions and was always looking for research ideas involving psychopathology in patients with movement disorders. Dr. Weinberger testified about the publications and the process for including names of authors and distributing drafts.

Dr. Weinberger conducted a preliminary review of Dr. Lewitt's buspirone proposal and, although the results looked uninspiring, agreed to let Dr. Naber do a more extensive trial after recruiting more ST patients. A protocol for a double blind study was approved. Dr. Weinberger would write the prescriptions, so he could not do the ratings. Instead, two "blinded" researchers were needed to evaluate the patients. Initially, Plaintiff indicated

[6]The title nevertheless appears on Dr. Weinberger's CV.

that she would like to participate, but then failed to appear, creating an unexpected crisis. A nurse, Marge Gillespie, stepped into the void and became a rater.

Dr Dieter Naber

Dr. Dieter Naber, a physician from Germany, worked at NIMH on two occasions. The first tour was in 1978-80 in the Biological Sciences Branch. He returned to NIMH in 1984-85 to complete his required neurology training. He worked primarily at St. Elizabeth's, but came to ETB two half-days per week to work in the outpatient clinic. He occasionally joined rounds on the inpatient ward or attended branch meetings. Dr. Naber recalls meeting Plaintiff the first or second time he went to the clinic when he was introduced to all the doctors at the branch. He believes Dr. Weinberger introduced him by stating that Dr. Polsby was seeing an interesting group of torticollis patients and that it might be a good idea for them to work together because the symptoms of that disorder were both neurological and psychiatric. The idea evolved within weeks. Plaintiff told him that the patients had interesting family histories with psychological diseases. There were a large group of torticollis patients at NIH. His study anticipated an interview accompanied by the performance of personality profile instruments: the MMPI and the Milton Health Behavior Inventory. Although he discussed the study with Plaintiff, at some point she stopped coming to the clinic regularly. It seemed to him that she did not care anymore. He first testified that the results were written up after his return to Germany in the Summer 1985. Later, confronted with a document demonstrating that the article was submitted to a journal before he left NIH, Dr. Naber acknowledged that he must have written it up sooner.

Coincidentally, Dr. Naber ran into Plaintiff just before he left and told her that the article was just about ready and "of course" she would be listed as an author. He planned to send her a draft prior to submission. Her response was that she did not care, that he could do whatever he wanted,that she was not interested. This exchange, like all of their conversations, was friendly.

The patients evaluated in this study included some seen by Plaintiff before Dr. Naber arrived as well as others recruited later through the usual reference process, through local publicity, and through Dr. Naber's attendance at a local support group meeting. Dr. Naber did not send a copy of the draft to Plaintiff. He claimed that he did not have her address, but more importantly concluded that she did not care to see the draft because of her remarks to him. He thought he was doing her a courtesy and favor by putting her name on the paper in recognition of the fact that she introduced him to some of the patients. He knows now that Plaintiff has expressed concern over her inclusion, but she has not contacted him directly to remove her name. Whether properly handled according to professional scientific standards or not, Dr. Naber's failure to send a draft to Plaintiff prior to submission with her name as an author had nothing to do with her gender.

Dr. Naber described his work on the buspirone and verapomil studies, and his thoughts about doing a third drug trial on amitriptyline. However, since his appointment was almost over by that time, that study was never done. He does not recall writing the Elavil protocol in Plaintiff's Exhibit 62, but cannot conclusively exclude it as his work product.

Patients

Col. Robert James Loe and Mr. Richard Duggan testified about their experiences at NIH. Both were members of a Spasmodic Torticollis support group and met Plaintiff at one of the group's meetings. She encouraged those who could participate to contact NIH about a study that was being organized. Except for that meeting, and a clinical interview, neither saw Plaintiff professionally at NIH.

Neuroimaging Section

Dr. Giovanni Di Chiro

Dr. Giovanni Di Chiro has been employed at NIH since 1958 and was chief of the neuroimaging section in 1983-85. The first contact with Plaintiff that he recalls was in March 1984 when he was demonstrating the new MRI to clinical associates and a PSP patient

displayed an interesting observation. He often suggested to fellows that they write up a report of interesting observations such as this one. Plaintiff wrote an abstract, (Plaintiff's Exhibit 29), and presented the findings on PSP and MRI.

Plaintiff was reassigned to Dr. Di Chiro's section after conversations with Dr. Kopin in November 1984. He learned that Plaintiff was having trouble with her current supervisor and had specifically asked for an assignment to the neuroimaging section, in part because she though Dr. Di Chiro was a fair individual. At that point, he recognized the individual being discussed as the one who had done the PSP work and agreed that she could come to his section as long as it did not affect the positions he already had in his section.

Plaintiff was given the ALS project under the supervision of Dr. Brooks who was the PET expert, a project which Dr. Di Chiro described as important despite the rejection from Science. Plaintiff had some complaints during the six months, but they appeared typical to Dr. Di Chiro. Plaintiff never brought preliminary findings to him, or showed him images. In the last days of June, Dr. Di Chiro asked Plaintiff to come to discuss the results and to give him the data. She said her findings were that the ALS scans were equal to the normal scans according to the analysis run by an individual in the Division of Computer Research Technology (DCRT). She gave him no paper, no printout. He was astonished. He had seen the abnormalities himself. He does not recall that Plaintiff offered to work on her own time after termination of her appointment.

At the end of June, Plaintiff both brought Dr. Di Chiro the negative results of the study and asked to stay with him for another year. All along, plaintiff had told him she was going to Georgetown for a residency in neurology and his agreement with Dr. Kopin was for Plaintiff to be there for six months. Dr. Di Chiro told Plaintiff that it was out of the question for her to stay. Furthermore, it would not be desirable for him, since she had not accomplished what she was supposed to accomplish. As far as he was concerned, Plaintiff had indicated that she was not suitable for this type of work. He would not have kept her on even if Dr. Kopin had lent him a position. The

ALS-PET project was assigned to Dr. Hatazawa who completed it, with Dr. Brooks, in a relatively short period of time. There was no reason to include Plaintiff as an author.

Dr. Rodney Brooks

Dr. Rodney Brooks, a physicist serving as a senior staff fellow in the neuroimaging section of NINDS, testified about his contact with Plaintiff after her transfer to Dr. Di Chiro's section for the last six months of her medical staff fellowship. He was supposed to be plaintiff's advisor on the ALS~PET project, which he and Dr. Di Chiro thought was a good match for Plaintiff's interests and skills. At the beginning, Plaintiff appeared to like the idea and took on the project willingly. The project was not an new one, but had been started by Dr. Luigi Mansi. His results had been written up and submitted to Science, but rejected for publication. It would be necessary to have more subjects to enhance the data base before resubmission for publication.

Dr. Brooks gave Plaintiff the preexisting data and discussed with her how to proceed. His primary role would take place after Plaintiff analyzed the scans and the data was to be compared. He saw Plaintiff from time to time, and they spoke about her progress. At some point plaintiff told him she would only do the original six patients, and she seemed to be having trouble with the computer program she was using. Plaintiff never submitted any findings in writing for him to review, and he specifically denied being shown the documents appearing as plaintiff's Exhibits 50, 51, 54 55, 56, and 57. The handwritten formula on Plaintiff's Exhibit 51 is in his handwriting and is the formula for metabolic rates. He learned orally of the results. Plaintiff said someone else had run the statistics showing no difference between the ALS patients and the controls. Because he and Dr. Di Chiro were sure there was a difference, they ignored plaintiff's oral report and assigned the project to Dr. Hatazawa after Plaintiff left.

Richard E. Carson

Richard Carson is a mathematician in the PET Department who began as a staff fellow in November 1983. He described the

filing system and the technical support provided to researchers. He recalled overhearing Plaintiff speaking with a new employee and extolling the virtues of her new development in analysis. Mr. Carson disagreed and said so. Plaintiff never asked him for help, and he referred her to Paul Baldwin on Plaintiff's Exhibit 53. He had no authority to grant access to data on normal volunteers.

G. Paul Baldwin

G. Paul Baldwin is now the chief PET technologist and was one of the technologists as of 1982. His job is to perform PET scans on patients, but he generally has no duties concerning their analysis. He recalled Plaintiff asking for help an unusually large number of times to log on to the computer. He stayed late six or more times to help her find and transfer data.

Dr. Marinos Dalakas

During 1983-1985, Dr. Marinos Dalakas was a senior staff fellow in the Infectious Disease Branch of NINDS. He selected the ALS patients for the PET study,and accompanied them when the scans were performed by the technicians. He had no role in the data analysis.

Other Witnesses

Dr. Oscar McNaughton Reinmuth

Ironically, expert witnesses often are criticized because they get paid for testifying and thus have a financial incentive to favor the party who calls them. In this case it is precisely because the "expert" was not paid that I find his testimony completely unhelpful. Dr. Reinmuth met Plaintiff after she left NIH and agreed to testify on her behalf as a favor because he believes in the principle which his testimony supports, encouraging young researchers to be independent. His own lack of independence as an expert witness destroys his credibility. For that reason, it is not necessary to recount his testimony.

Dr Jonathan Pincus

Dr. Jonathan Pincus, who shares some of Plaintiff's research interests in the criminal brain, met Dr. Polsby in February 1987 at a Parkinson's support group in Kensington, Maryland on a Saturday.

He and Plaintiff had discussions both before and after his talk. Plaintiff told him she was suing Dr. Chase for sex harassment, but the real reason for the suit was that she had not received proper credit on a paper for her ideas or her work. Because there was no way for her to get back at Dr. Chase for the professional slight, she was suing him for harassment. Plaintiff indicated that she would not have brought suit if her research had not been stolen.

Plaintiff's facility for recreation of events was demonstrated on rebuttal. She claims to recall precise sentences in this conversation of nine years ago. She now says she told Dr. Pincus that she filed an administrative complaint alleging sex discrimination, but that later events such as the publication of research without giving her proper credit caused her to follow through with the filing of the lawsuit. While I doubt that Plaintiff in fact admitted to fabrication of the grounds of the suit to Dr. Pincus, neither can I credit Plaintiff's version. Dr. Pincus, in short, has very little to add to the drama.

Analysis

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an employee with respect to any of the terms, conditions, or privileges of employment because of the employee's gender. There is a threshold question presented by Plaintiff's claim. Not every aspect of an employment relationship constitutes a "term, condition, or privilege" of employment. Sometimes terms and conditions may be set by an employment contract, whether formal or informal, and any such terms promised to an employee as part of the employment contract cannot be withheld on the basis of gender. Furthermore, even if an employer has no contractual obligation to provide employees with a particular benefit, the benefit may become a privilege of employment if it is provided to some employees. Such a benefit or incident of employment similarly may not be provided in a discriminatory manner. Thus, the phrase "terms, conditions and privileges of employment" includes any benefit that was part and parcel of the employment.

Plaintiff cannot contend that she was denied the contractual terms of employment, such as the position and salary. She claims,

however, that the Defendant denied her the full benefits of employment as a medical staff fellow at NINCDS by (1) denying her the opportunity to pursue a third year and subsequent years as an NIH research physician; (2) denying her mentoring; (3) disproportionately assigning her routine ministerial office and support tasks; (4) denying her opportunities for independent research; and (5) misappropriating and publishing her research without her consent and without giving her proper credit.

The Defendant contends that none of Plaintiff's complaints, with the exception of the extension for the third year, involve cognizable terms, conditions or privileges of employment under Title VII. As a matter of fact, I conclude that mentoring was a benefit of the medical staff fellowship, but that the right to conduct studies according to one's own research ideas and the exclusive right to certain patients are not part of the fellowship. Concomitantly, if assignment of routine tasks prevents other positive attributes of the fellowship, it could be actionable. Thus, plaintiff must prove that she was denied the third year or mentoring because of intentional gender discrimination in order to prevail. This burden requires proof, first, of the denial of the employment benefit, and second, that the reason was intentional gender discrimination. Proof of discriminatory intent can be either direct, Trans World Airlines, Inc. V. Thurston, 469 U.S. 111, 121 (1985), or indirect, through the burden-shifting method of proof set forth in McDonnell Douglas Corp. V Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs V Burdine, 450 U.S. 248, (1981). The McDonnell Douglas approach consists of three stages of analysis summarized as follows:

> The plaintiff must first make out a prima facie case of discrimination. Establishing a prima facie case shifts a burden of production to the defendant to present evidence of a legitimate, nondiscriminatory reason for the adverse action. If the defendant produces evidence of such a reason, then the plaintiff must show that the reason presented by the defendant is merely a pretext for

> discrimination. The plaintiff retains the ultimate burden of persuasion throughout the process.

Jamil V Secretary, Dep't of Defense, 910 F.2d 1203, 1206 (4th Cir. 1990).

Plaintiff was clearly denied the opportunity to pursue a third and subsequent years of a research fellowship. The next question, then, is whether Plaintiff has proven that she was denied mentoring as part of the fellowship. Based on the testimony at trial, I define mentoring as the opportunity to work with a senior scientist on research projects and to receive guidance from the senior scientist on procedures for planning, implementing, recording, and reporting results of the projects. In order to receive mentoring, a fellow has to be assigned to work in the section or branch of a senior scientist and to have the opportunity to join in his or her work. She also has to have a chance to talk on a regular basis with the mentor, to ask questions and to receive feedback on her own work. Plaintiff received mentoring during her fellowship. What she really complains about is that she did not establish as good a mentoring relationship as she had hoped and that she found the type and quality of research opportunities disappointing. Disappointment of that type cannot be characterized as denial of a term, condition or privilege of employment. Congress simply cannot legislate that all employment relationships enjoy the best communication or provide the most rewarding learning experience. All Title VII can mandate is that employees receive the basic components of the position.

Plaintiff's claim of misappropriated research also fails. There is no evidence, other than Plaintiff's own assertion, that any medical staff fellow obtained an exclusive proprietary interest in any particular patient or group of patients. Certainly, no medical staff fellow had the right to prevent other researchers from including clinic patients in research. Instead, the process was that research within the branch was discussed at weekly clinic meetings, and patients were invited to participate in studies as the need and opportunity arose. Plaintiff was clearly afforded the opportunity to participate in the

buspirone study but chose not to for her own reasons. There is no evidence that an Elavil study was undertaken during her tenure, but nothing sinister can be gleaned from that fact. The family history and psychological profile work was done to some extent, but Plaintiff's failure to express an active interest was the only impediment to her own fuller participation.

Plaintiff also has not proven that she was disproportionately assigned routine duties. If anything, the evidence shows that Plaintiff failed to fulfill those routine duties reliably performed by others. The undersigned concludes that whatever deficiencies existed in the relationship between Dr. Poisby and Dr. Chase were not the result of intentional gender discrimination by Dr. Chase. He treated Plaintiff the same as other fellows and always reacted to her as an individual. There simply is no credible evidence to support Plaintiff's perception that her gender affected that relationship, other than in her own mind.

Similarly, Plaintiff, during her six-month stint in the neuroimaging section with Dr. Di Chiro, did not suffer intentional gender discrimination. There is neither direct nor circumstantial evidence of discriminatory intent from her treatment by any of the researchers or support technical staff. Plaintiff's challenge to Dr. Di Chiro's motivation is made with ill grace, given Plaintiff's own admission that he always treated her fairly until he did not like her results. Dr. Brooks's credibility is questionable given his convenient memory swings, but he still has not been shown to have treated Plaintiff differently than anyone else in her situation. He would have been available to help with data analysis had Plaintiff presented any data. The other professionals in the PET section did their jobs and did not thwart Plaintiff's access. Any difficulty Plaintiff encountered in locating scans and laboratory figures was typical given the structure of the record-keeping at the time, and not unique to her, or based on her gender.

Plaintiff's attempt to compare her experience with that of other fellows is simply unavailing. A medical staff fellowship is inherently unique for each researcher. While there may be some ba-

sic similarities, scientific research is not the type of repetitive experience that lends itself to easy comparison within the framework of employment discrimination law. Thus, Plaintiff has not established that she was deprived of some significant aspect of her fellowship that was routinely afforded to male fellows under similar circumstances. Even the third year extension was not shown to have been extended to similarly situated male fellows, either by Dr. Chase or Dr. Di Chiro, or in NINCDS generally. But even if she had presented a prima facie case on that issue, I find that she has not shown that her failure to receive an offer for the third year was based on gender discrimination. As found above, Plaintiff's subjective disappointment is not enough to show differential treatment during the first two years; it, therefore, follows that the assessment by Dr. Chase and others that it would not be in Defendant's interest to extend Plaintiff's fellowship was based on factors other than gender.

CONCLUSION

For all of the foregoing reasons, the court finds that Plaintiff has failed to prove her claims of gender discrimination. Accordingly, judgment will be entered for Defendant.

Signature

DEBORAH K. CHASANOW
United States District Judge

March 28 ,1996

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M. MAUREEN POLSBY, M.D.	:
	: CONSOLIDATED
v.	: Civil Action No. DKC 88-2344
	:
DONNA E. SHALALA, secretary	:
DEPARTMENT OF HEALTH and	:
HUMAN SERVICES	:

ORDER OF JUDGMENT

The court. having returned a verdict in favor of Donna Shalala, Secretary of the Department of Hea1th and Human Services against M. Maureen Polsby, it is this 28th day of March, 1996, ORDERERD that:

1. Judgment is entered in favor of Donna Shalala, Secretary of the Department of Health and Human Services against M. Maureen Polsby;

2. Any and all prior rulings made by this court disposing of any c1aims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within. the meaning of Fed. R. Civ. P. 58;

3. The Clerk is directed to close this case; and

4. The Clerk is directed to mail a copy of this Order and the foregoing Memorandum Opinion to counsel for the parties.

Signature

DEBORAH K. CHASANOW
United States District Judge

APPENDIX F

May 1, 1999

Probability Of Random Selection

The 3-judge review panel was comprised of judges all of whom had voted unfavorably in the Robinson *en banc* rehearing, including the author of the opinion. Of pertinence is the probability that such a review panel would have been selected had the panel selection process been truly random, i.e., unbiased in any way.

To calculate this probability, one first needs to know how many judges there were total from which to select the 3-judge panel.

There are 13 Resident Active Judges sitting on the 4th Circuit U S. Court of Appeals, two of the fifteen positions on the Court being unfilled. There are also a number of Resident Senior Judges with less than a full workload, plus some Visiting Judges who help. There were, therefore, more than 13 judges from which to select a 3-judge panel. Since the Resident Senior Judges do not work fulltime, nor do the Visiting Judges (at least at this Court), one needs to determine the number of judge-equivalents that are available to the Court.

In the 12-month period ending Sept. 30, 1998, the Resident Active Judges participated in 6351 cases, the Resident Senior Judges participated in 1134 cases, and the Visiting Judges participated in 381 cases. If 6351 cases equates to the services of the 13 fulltime Resident Active Judges, then the fact that there were 1134 cases receiving the services of the Resident Senior Judges implies that there were an additional 2.32 judge-equivalents available to the Court from the ranks of the Resident Senior Judges. Similarly, if 6351 cases equates to the services of the 13 full-time resident Active Judges, then the fact that there were 381 cases that received the

services of Visiting Judges implies that there were an additional 0.78 judge~equivalents available to the Court from the several sources of Visiting Judges. Granted, some cases take more time than others; but with the high volume of cases heard over a year's time, the mathematics is valid.

Thus, the total number of judges, or judge-equivalents, from which a 3-judge panel could have been selected was 13 + 2.32 +0.78 = 16.10. Rounding this number to 16 facilitates mathematical computation although the probabilities that are presented below are a bit higher than actual. (There is a lesser probability of selecting a 3-judge panel of a particular composition from a pool of 16.10 judges than from a pool of 16 judges.)

Noting that only 7 judges voted unfavorably in the Robinson *en banc* rehearing, one of whom wrote the opinion, the mathematical problem can then be defined as follows:

If there are 16 judges, of which only six (those who originally voted unfavorably) wear red robes, and of which only one (who originally voted unfavorably *and* was the author of the original opinion) wears a purple robe:

The probability that three judges selected at random from the pool of 16 would all wear either a red or a purple robe is 6.25% (.0625).

And (the actual circumstance) the probability that three judges selected at random from the pool of 16 would include two with red robes plus the one with a purple robe is 2.68% (.0268).

In situations of this sort, it is common to establish a hypothesis and then test it to some degree of probabilistic certainty. A 95% degree of certainty is commonly used; that is, if there is less than a 5% chance that a random process would produce the observed result, then the hypothesis of a random process is rejected.

If the above panel-selection problem is set up as a test of the hypothesis that the panel selection was random, then the hypothesis fails. The reasonable mathematical conclusion is that the panel was not chosen randomly.

The pages that follow present the specifics of the mathematical calculations:

Probability Calculations

The first probability calculation, which doesn't exactly apply to the actual case at hand, but is illustrative in leading into the calculation of the actual case, equates to asking the following question: If 7, and only 7, of 16 marbles in a bowl are yellow, and three marbles are selected at random, what is the probability that all three will be yellow?

This is a simple problem in basic probability, which asks how many ways can 3 yellow marbles be selected from 7 yellow marbles divided by the total number of ways that 3 marbles can be selected from a group of 16 marbles. In mathematical symbology, this is written as:

$$\frac{{}_7C_3}{{}_{16}C_3} \qquad (1)$$

or the number of combinations of 7 things taken 3 at a time (the number of ways that 3 things can be selected from 7 things) divided by the mimber of combinations of 16 things taken 3 at a time (the number of ways that 3 things can be selected from 16 things). The order in which the three yellow marbles are selected (the order in a Combination) is immaterial. Not only will any three yellow marbles do, but any three yellow marbles in any order will do.

Mathematically, ${}_nC_x$ is calculated as:

$$\frac{n!}{(n-x)! \cdot x!}$$

That is, the numerator above equals:

$$\frac{7!}{4! \cdot 3!} \text{ or } \frac{7 \cdot 6 \cdot 5 \cdot 4 \cdot 3 \cdot 2 \cdot 1}{4 \cdot 3 \cdot 2 \cdot 1 \cdot 3 \cdot 2 \cdot 1} = 35$$

and the denominator above equals;

$$\frac{16!}{13! \cdot 3!} \text{ or } \frac{16 \cdot 15 \cdot 14 \cdot 13 \cdot 12 \cdot 11 \cdot 10 \cdot 9 \cdot 8 \cdot 7 \cdot 6 \cdot 5 \cdot 4 \cdot 3 \cdot 2 \cdot 1}{13 \cdot 12 \cdot 11 \cdot 10 \cdot 9 \cdot 8 \cdot 7 \cdot 6 \cdot 5 \cdot 4 \cdot 3 \cdot 2 \cdot 1} = 560$$

and the probability of selecting 3 yellow marbles from a group of 16 marbles when only 7 marbles are yellow equals 35/560, or 0.0625.

Another way of addressing the problem is to write down the probabilities directly. Thus, the probability of selecting a yellow marble on the first draw is 7/16; the probability of selecting a yellow marble on the second draw is 6/15 (since there is one less yellow marble as well as one less marble total) and, similarly, the probability of selecting a yellow marble on the third draw is 5/14. Order doesn't matter; only yellow marbles count and with each draw it is a matter of selecting a yellow marble, and only a yellow marble, from amongst the remaining marbles in the bowl. Since the first draw and the second draw and the third draw all have to occur, these three fractions are multiplied together, with a result identical to the result above: 0.0625.

The second probability calculation, which is the one that applies to the actual case at hand, is slightly more complicated. It is equivalent to asking the following question: If 6, and only 6, of 16 marbles in a bowl are red, and 1, and only 1 (the author of the original opinion),

is purple, and three marbles are selected at random, what is the probability that two of the red marbles and the one purple marble will be drawn?

The problem now asks how many ways can 2 red marbles be selected from 6 red marbles and 1 purple marble be selected from 1 purple marble, all divided by the total number of ways that 3 marbles can be selected from a group of 16 marbles. In mathematical symbology, since both two red marbles and the lone purple marble must be selected, this probability is written as:

$$\frac{{}_6C_2 \bullet {}_1C_1}{{}_{16}C_3} \qquad (2)$$

or the number of combinations of 6 things taken 2 at a time (the number of ways that 2 things can be selected from 6 things), times the number of combinations of 1 thing taken 1 at a time (the number of ways that 1 thing can be selected from 1 thing), divided by the number of combinations of 16 things taken 3 at a time (the number of ways that 3 things can be selected from 16 things).

That is, (since 0! = 1) the numerator above equals:

$$\frac{6!}{4! \bullet 2!} \times \frac{1!}{1! \bullet 0!} \text{ or } \frac{6 \bullet 5 \bullet 4 \bullet 3 \bullet 2 \bullet 1 \bullet 1}{4 \bullet 3 \bullet 2 \bullet 1 \bullet 2 \bullet 1 \bullet 1 \bullet 1} = 15$$

and the denominator above equals 560 as in expression (1).

Thus, the probability of randomly selecting from 16 marbles a lone purple marble, as well as 2 red marbles from a group of 6 red marbles, is 15/560, or 0.0267857.

Another way of addressing the problem is to write down the probabilities directly. Thus, the probability of selecting a red marble on the first draw is 6/16, the probability of selecting a red marble on

the second draw is 5/15 (since there is one less red marble as well as one less marble total), and the probability of selecting the purple marble on the third draw is 1/14 (since there is only one purple marble as well as one less marble total). Considering that all three draws occur as designated, these probabilities are multiplied together, with a result equal to 0.00892857. However, 0.00892857 is the probability of drawing red/red/purple) in that order; and order doesn't matter. The criteria are also satisfied if the selection is red/purple/red, or purple/red/red; which sequences are equally as likely. Therefore, 0.0089257 must be multiplied by 3 with a result identical to the result above: 0.0267857.

These probability calculations were done by G. H. Dimon, Jr., an operation research analyst with over three decades of experience. He is a Past President and an Original Fellow of the Military Operations Research Society and has taught graduate mathematical probability and statistics.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1100 East Main Street
Richmond, Virginia 23219

PATRICIA S. CONNOR
CLERK

TELEPHONE
(804) 771-2213

May 20, 1997

M. Maureen Polsby, M.D.
3416 Livingston Street, NW
Washington, DC 20015

Re: 96-1793, Polsby v. Shalala

Dear Dr. Polsby:

This responds to your letter of May 12, 1997. As previously stated, Ms. Nagle will remain as the case manager assigned to your case. In response to your inquiry regarding the process for assigning judges to cases, please be advised that it is done through an automated panel assignment program that is part of the Appellate Information Management System used by the federal appellate courts. The United States Attorney's Office has no access to this system, no information regarding assignment of cases, and no influence over the process.

You inquire about this Court's follow-up for the transcript. As stated in this office's letter to Assistant U.S. Attorney McDermott, on which you were copied, this office routinely follows up on past due transcripts. I enclose for your records a copy of this Court's follow-up letter of January 29, 1997, to court reporter Barbara Shaulis, which was referenced in our letter to Ms. McDermott.

With respect to your inquiry regarding sanctions for the late filing of the transcript, these are governed by the Court's transcript guidelines which impose a 10% sanction for overdue transcripts and a 20% sanction if the transcript is more than 30 days late. Sanctions are not determined by the Assistant United States Attorney.

Yours truly,

Signature
Patricia S. Connor

cc: Kathleen McDermott

APPENDIX H

February 12, 1992

JAMA
The Journal of the American Medical Association

Harassment Linked to Fraud, Lawsuit Alleges

ALLEGATIONS that sexual harassment at tht National Institutes of Health (NIH), Bethesda, Md. led to research fraud are now part of a federal lawsuit under the Racketeer Influenced and Corrupt Organizations Act.

If false, the charges are a heinous insult to highly reputable researchers. If true, they constitute perhaps the most egregious example of what some women's health advocates say is the extent to which sexual harassment can be damaging not only to the women in medicine but to the science of medicine itself. (See preceding article.)

Maureen Polsby, MD, says it all started when she refused to go to bed with the man who recruited her for a medical staff fellowship at the (then) National Institutes of Neurologic and Communicative Disorders and Stroke (NINCDS), which since has been reorganized into the National Institute of Neurological Disorders and Stroke and the National Institute on Deafness and Other Communicative Disorders.

Thomas Chase, MD, who was clinical director and is now laboratory chief, says that "as a matter of policy" he does not comment on anything undergoing investigation. However, in court depositions he has denied all charges. Another author on the allegedly fraudulent paper calls the charges "preposterous and absurd."

Tests challenged

Polsby says Chase gave her research ideas to male colleagues. She says that they then published papers in peer-reviewed journals based on her work. Certain tests were reported as being done that Polsby and at least one subject in the study say were not done.

A suit charging both sexual discrimination and fraud was dismissed by a US District Court judge in Maryland in December because Polsby had not filed her complaint within the existing 30 day statute of limitations (since raised to 90 days) on sex discrimination complaints by federal employees. She has now filed a new suit containing only the racketeering-provision allegations.

Calls for an investigation of the case outside of court apparently have not resulted in action to date. Sen. Thomas A. Daschell (sic) (D, SD) requested the congressional General Accounting Office to investigate. An aide to the Senator says the General Accounting Office turned the matter over to the Inspector General's Office of the Department of Health and Human Services. However, a spokesperson for the Inspector General's Office says, she is "not aware of any such case."

The government attorney handling the lawsuit, Elizabeth Gianturco, says she cannot confirm or deny any internal investigation of Polsby's charges at the NIH or by any other government agency. She says that no comment is ever made on pending litigation.

One Side of Story Being Told

According to Polsby, she was chief resident in her third year of a 3-year residency at the Tufts New England Medical Center, Boston, Mass, when she left to take the NINCDS job with the understanding that she would receive 1 year's residency credit for her first 2 years' work.

Polsby alleges that after two months on the job, she turned down a sexual proposition from Chase, and that he then "threw me to the wolves. I got assigned all the scut work, which none of the male fellows did, and saw patients no one else wanted to see." A male fellow who started at the same time as Polsby was allowed to do his own research full-time, she says.

Polsby says that when she did accomplish work with promising results, Chase took projects away from her and gave them to

male colleagues. The third time this allegedly happened, with a study using amitriptyline hydrochloride to treat spasmodic torticollis, she says, she decided to fight for the project. She filed an Equal Employment Opportunity (EEO) complaint.

Polsby charges that, in retaliation for her EEO complaint, Mark Hallett, MD, clinical director of the NINCDS, wrote the American Board of Psychiatry and Neurology that, due to an NIH policy change, Polsby could not use her 2 years as a fellow toward completion of her residency, which meant that she was not board eligible. Hallett's office referred all inquiries to Gianturco.

Only after she filed a sexual discrimination lawsuit, Polsby says, did she learn about a published paper that she says is fraudulent. She then filed another lawsuit, in January 1990, charging fraud and racketeering along with sex discrimination. Within days of filing that suit, Polsby says, she received a letter from the American Board of Psychiatry and Neurology board saying that she is board eligible in neurology.

Patient Says Test Not Done

Richard J. Duggan, a retired college English teacher from Ventnor, NJ, who says he was a subject in the disputed study, first discovered what he also alleges are false statements in the paper entitled "Personality Variables, Neurological and Psychopathological Symptoms in Patients Suffering From Spasmodic Torticollis" *(Compr Psychiatry*.1988;29: 182-187).

Polsby is listed as fourth author, but she says she knew nothing of the paper until Duggan, who was editor of a newsletter for a patient support group, ran across it while doing a MEDLINE search for story ideas and told her about it.

The *Comprehensive Psychiatry* paper says that patients were given computed tomographic scans, cervical spine roentgenograms, and psychiatric explorations. "None of this ever happened to me," says Duggan. Duggan says eight other patients he knew in the study also told him that such tests were not performed on them.

The paper says 32 patients were studied, but Duggan says he and the other patients can think of only one other person in the study.

"The thing I know is not true, and that I would go to court for, is the methods section of the article. If this is what they did, then I was not in the group or the data were totally fabricated," says Duggan.

A nurse practitioner who served as patient coordinator for NINCDS torticollis studies confirms that Duggan was a subject, but says she does not remember which patients were in what studies, or what tests individual patients had. She also says that at the time she did not know of other patients besides those Duggan knew of, "but obviously there were."

The editor-in-chief of *Comprehensive Psychiatry,* Ralph A. O'Connell, MD, says the first he heard of any of these allegations was *JAMA's* inquiry in early January.

"The only thing I can tell you," says O'Connell, "is that the second author, Dan Weinberger, MD, is really top flight. This is coming out of a very reputable laboratory."

O'Connell adds that Polsby "must have signed a copyright release." She maintains, however, that she was never informed that her name would appear on the paper, disagrees with its conclusions and methods, and was unaware its existence until after its publication.

Preposterous, Says Coauthor

Weinberger, chief of the clinical brain disorders branch at the National Institute of Mental Health, says that Polsby's charges are "preposterous, absurd. There's really nothing else to be said about it."

Weinberger says he is not aware of any sexual harassment "that ever was perpetrated toward Polsby at all." While he says he is not aware of any ongoing investigation, he also says he is sure an

investigation would show that the published results were an accurate reflection of the research that was done. He maintains that the work was done primarily by the paper's first author, Deter Naber, MD, who has since reportedly returned to Germany. Efforts to reach him were unavailing.

In court depositions, the defendants deny all charges, and Chase contends that Polsby had failed to show up for rounds, was "difficult to control," had misdiagnosed a patient, and administered drugs without proper authority. Polsby acknowledges that she was sometimes late, but no more so than her male colleagues. She maintains that the diagnosis Chase questions was correct, and that use of the drug chase cites in his deposition, baclofen, was approved by the Food and Drug Administration.

"It's a really sad thing" that Polsby is pursuing the case "rather than doing something herself," Weinberger concludes.

Polsby says one of the main reasons she is "fighting this fight is to try to expose what goes on and to get things to change."

— by Paul Cotton

(2)

No. 99-53

Supreme Court, U.S.
FILED
JUL 27 1999
OFFICE OF THE CLERK

In the Supreme Court of the United States

M. MAUREEN POLSBY, M.D.,

Petitioner,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, DR. THOMAS CHASE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC., THE FEMINIST MAJORITY FOUNDATION, THE FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,

[Additional *Amici Curiae* Listed on Inside Cover]

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THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, SELF HELP FOR EQUAL RIGHTS, WIDER OPPORTUNITIES FOR WOMEN, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Amici will address the following question:

Did the court of appeals improperly deny petitioner the right to present evidence to support her claims of post-employment retaliation by defendants after this Court ruled that former employees are covered by Title VII?

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BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC., THE FEMINIST MAJORITY FOUNDATION, THE FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, SELF HELP FOR EQUAL RIGHTS, WIDER OPPORTUNITIES FOR WOMEN, WOMEN EMPLOYED, AND THE WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Each of the *amici curiae* has a strong interest in the proper application and enforcement of Title VII and in assuring the fair and equal treatment of women in the judicial system. In this case, the Fourth Circuit failed to give effect to this Court's correction of its erroneous ruling that Title VII does not afford protection to former employees. *Amici* believe that reversal of the court of appeals' decision is crucial to ensuring that women alleging sex discrimination and plaintiffs in other employment discrimination cases receive a full and fair opportunity to vindicate their rights under Title VII and other civil rights statutes.[1]

1. The National Organization for Women Foundation, Inc. (NOW Foundation), is a 501(c)(3) organization devoted

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[1] The Solicitor General has consented to the filing of this *amici curiae* brief; a letter indicating consent has been filed with the Clerk of the Court. In addition, pursuant to this Court's Rule 37.6, *amici* certify that counsel for a party did not write this brief in whole or in part, and that no person other than *amici* made a monetary contribution to the preparation of the brief.

to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women (NOW), the largest feminist organization in the United States, with more than 500,000 contributing members in more than 500 chapters in all 50 States and the District of Columbia. Since its inception in 1986, NOW Foundation's goals have included equality and fair treatment for women.

2. The Federation of Organizations for Professional Women (FOPW) is a national non-profit federation of affiliated women's organizations and individual associate members, working since its inception in 1972 to enhance the status of professional women. The FOPW is dedicated to professional and scientific integrity. Among FOPW's many goals are strengthening women's networking and communication skills through training and education, providing a forum for the mutual exchange of ideas and support, and keeping its membership abreast of legal developments that impact professional women.

3. The Feminist Majority Foundation (FMF) is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. FMF is dedicated to eliminating sex discrimination and to promoting equality, women's rights, and safe access to abortion and birth control. For years, FMF has supported Dr. Polsby's efforts to remedy the discrimination and injustices she endured in her position at the National Institutes of Health. FMF houses the Maureen Polsby Legal Defense Fund, which assists in securing funding for costs associated with her case.

4. The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed many *amicus curiae* briefs before this Court and the federal appellate and

district courts regarding the proper interpretation and application of employment discrimination laws. NELA filed an *amicus* brief in *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), and NELA members have brought post-employment retaliation cases following *Robinson*. NELA thus has a compelling interest in ensuring that the holding of that case is followed and that Title VII protections for former employees are protected and fully realized.

5. The National Partnership of Women & Families (NPWF) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the NPWF (formerly the Women's Legal Defense Fund) has placed special emphasis on ensuring effective and rigorous enforcement of Title VII by monitoring agencies' EEO enforcement efforts, challenging sex-based discrimination in the courts, and leading efforts to promote federal legislation protecting employees.

6. The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace.

7. NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of NOW as a separate organization. A major goal of NOW LDEF is the elimination

of barriers that deny women economic opportunity. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting employment discrimination.

8. Self Help for Equal Rights (SHER) is a women's advocacy group at the National Institutes of Health (NIH), the major health research organization of the United States government. Organized in 1972, SHER has worked continuously for employee rights and against sex discrimination in the workplace at NIH. At NIH, SHER monitors the EEO process and advocates on behalf of women for internal process improvements. SHER also educates employees at NIH about the EEO complaint process, represents women in EEO grievances and appeals, and disseminates news and advice through weekly meetings, speaker programs, and flyers.

9. Wider Opportunities for Women (WOW) works nationally and in its home community of Washington, D.C., to achieve economic independence and equality of opportunity for women and girls. For more than 30 years, WOW has helped women learn to earn, with programs emphasizing literacy, technical, and nontraditional skills, the welfare-to-work transition, and career development.

10. Women Employed is a national association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women facing problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sex discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace.

11. The Women's Law Project (WLP) is a non-profit public interest legal center located in Philadelphia,

Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has a strong interest in the eradication of sex discrimination in the workplace and the availability of strong and effective remedies for women whom seek relief from discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Maureen Polsby's career as a neurologist was permanently derailed by her former employer's acts in retaliation for her exercise of rights under Title VII. Dr. Polsby fought long and hard to have her retaliation claims fully and fairly adjudicated but was prevented from doing so — first by the Fourth Circuit's erroneous decision that post-employment claims were not covered by Title VII, and later by its failure to give effect to this Court's reversal of that decision. The court of appeals' reluctance to apply current law to a case on appeal, its willingness to make *de novo* factual findings on the basis of an incomplete evidentiary record, and its improper application of harmless error doctrine demand an exercise of this Court's supervisory powers.

Dr. Polsby's case first came before this Court several years ago after the court of appeals summarily affirmed the dismissal of her sexual harassment claims as untimely and used her case as an opportunity to rule, *sua sponte*, that post-employment retaliation claims were not cognizable under Title VII. After this Court granted her petition for certiorari, vacated the Fourth Circuit's judgment, and remanded the case, Dr. Polsby pursued her post-employment claims in the district until the Fourth Circuit ruled once again, in *Robinson* v. *Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), that Title VII does not protect former employees from retaliation. Bound by that then-controlling precedent, the district court did not allow Dr. Polsby's post-employment claims to proceed to trial. While

Dr. Polsby's case was on appeal, this Court reversed the Fourth Circuit and ruled that post-employment retaliation claims are cognizable under Title VII. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).

Although Dr. Polsby was plainly entitled to benefit from this change of the law in her favor, the court of appeals refused to revive her post-employment retaliation claims. Instead of following the normal procedure of reversing and remanding for further proceedings consistent with *Robinson*, the court of appeals ruled instead that "any error" in ruling out Dr. Polsby's post-employment claims was harmless because "the evidence failed to support her claims of post-employment retaliation."

The Fourth Circuit's decision that the dismissal of Dr. Polsby's post-employment claims was "harmless" was blatant error. According to the court of appeals, it reviewed the record and determined that Dr. Polsby had presented insufficient evidence to support her post-employment claims. ***But those were the very claims that the Fourth Circuit's overly narrow interpretation of Title VII had foreclosed.*** Dr. Polsby never had the opportunity to litigate those claims in the district court, and the court of appeals' decision that she should lose that right again because the record evidence of retaliation was insufficient was utterly irrational.

The court of appeals' highly prejudicial error emerged from its disregard of multiple principles of appellate procedure. First, appellate courts are required to apply intervening changes in the law to cases on appeal. Second, appellate courts normally should not act as initial factfinders, and ***may not*** properly do so when an error below has rendered the record incomplete. Third, and relatedly, appellate courts may not deem "harmless" errors that entirely prevented the plaintiff from presenting in the district court evidence relating to a legally sustainable claim.

Dr. Polsby's is not the only case in which the Fourth Circuit has effectively denied litigants the benefit of this Court's decision in *Robinson* v. *Shell Oil*. In fact, the court of appeals has expressed doubt whether the interpretation of Title VII announced in *Robinson* applies "retroactively" to events that occurred before the *Robinson* decision.

The Fourth Circuit's apparent reluctance to apply a decision of this Court affording more expansive protection to victims of unlawful retaliation and its eagerness to affirm a district court decision that denied the plaintiff ***any*** opportunity to present her retaliation claims at trial threatens plaintiffs in all civil rights cases. Victims of discrimination rely on the courts of appeals to correct trial errors that deny them the ability to vindicate their rights. This Court should grant the petition for certiorari and reverse the Fourth Circuit's decision.

STATEMENT OF THE CASE

The procedural history of this case has been described as "somewhat tortured," *Polsby* v. *Shalala*, 925 F. Supp. 379, 381 (D. Md. 1996). The following facts are relevant to the issue raised in this *amicus* brief.

Dr. Maureen Polsby alleged that she was the victim of gender-based discrimination during her two-year tenure as a medical staff fellow at the National Institutes of Health (NIH) from 1983 to 1985, in violation of Title VII of the Civil Rights Act of 1964. She claimed, among other things, that during her fellowship (after she rejected one supervisor's sexual advances at a medical conference) her supervisors treated her differently than her male peers by assigning her to menial tasks; failing to support her research projects; misappropriating her independent research; and denying her the renewal of her fellowship for a third year.

Dr. Polsby also alleged that the defendants retaliated against her for pursuing a discrimination complaint. Among other acts of retaliation, Dr. Polsby claimed that, shortly after

she initiated EEOC proceedings, one of her supervisors represented in a letter to the American Board of Psychiatry and Neurology that Dr. Polsby's completion of the two-year fellowship did not entitle her to any credit toward the residency requirements necessary for board certification. Dr. Polsby alleged that, as a result of this and other retaliatory conduct by the defendants, her medical career was irrevocably derailed.

In 1988, after exhausting her administrative remedies, Dr. Polsby sued the defendants in the United States District Court for the District of Maryland. In 1991, the government moved for summary judgment on the grounds (1) that all of Dr. Polsby's claims were untimely; and (2) that she could not make out a *prima facie* case for her retaliation claims. The district court granted summary judgment against Dr. Polsby, ruling that her claims were time-barred because she had failed to contact an EEO counselor within thirty days of the challenged behavior and that no equitable principles excused the untimely filing. *Polsby* v. *Sullivan,* No. HAR 88-2344, 1991 U.S. Dist. LEXIS 17347, 57 Fair Empl. Prac. Cas. (BNA) 753 (D. Md. 1991) ("*Polsby I*"). The court did not reach the issue of whether Dr. Polsby had established a *prima facie* case of retaliation.

Dr. Polsby appealed to the Fourth Circuit, which affirmed the district court's ruling that the claims were time-barred. The Fourth Circuit also ruled, *sua sponte*, that Dr. Polsby's claims of post-employment retaliation were not actionable because Title VII does not protect former employees. *Polsby* v. *Chase*, 970 F.2d 1360 (4th Cir. 1992) ("*Polsby II*"). *Polsby II* was the first decision in which the Fourth Circuit advanced this narrow reading of Title VII — and was issued at a time when almost every other circuit to have assessed the breadth of Title VII had reached a contrary determination.

Dr. Polsby filed a petition for certiorari. Representing the defendants, the Acting Solicitor General confessed error and

agreed with Dr. Polsby that the district court erred in ruling that her claims were time-barred. The government also agreed with Dr. Polsby that post-employment claims were actionable under Title VII, but argued that the case was "an inappropriate vehicle for resolving that question":

> The parties did not brief or argue the question in the court of appeals. * * * Moreover, because the government disagrees with the court of appeals' view that the retaliation provisions of Title VII are entirely inapplicable to former employees, neither party in this case supports the conclusion of the court of appeals on that point. * * * In sum, because the decision of the court of appeals constitutes an alternative ground for decision unnecessary to the result and does not rest on an adversary presentation of the question, there is no reason for this Court to consider the question at this time.

Gov't Br., No. 92-966, 8-9. The government recommended that this Court grant Dr. Polsby's petition, vacate the judgment, and remand to the Fourth Circuit for reconsideration of the timeliness issue alone.

This Court followed that recommendation, vacating and remanding the decision to the Fourth Circuit "in light of the position presently asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." *Polsby* v. *Shalala*, 507 U.S. 1048 (1993) (*"Polsby III"*). The court of appeals, in turn, remanded the action back to the district court.

After the remand, Dr. Polsby filed two additional complaints, alleging that further acts of retaliation had occurred since the filing of her first complaint. The district court consolidated the complaints and denied the government's motion to dismiss with respect to all but one of Dr. Polsby's claims of post-employment retaliation. See *Polsby* v. *Shalala*, No. DKC 88-2344, slip op. at 15-16 (D. Md. April 20, 1995)

("*Polsby IV*").[2] The surviving post-employment claims concerned the defendants' denial of residency credit for Dr. Polsby's fellowship, their attempts to interfere with her later efforts to earn residency credit, and the misappropriation of her research. The district court expressly ruled (*id.* at 16) that two of these claims fell under the purview of the Civil Rights Act of 1991, which provides for the trial by jury of certain violations of Title VII.

While Dr. Polsby's case was proceeding in the district court, a panel of the Fourth Circuit ruled that post-employment retaliation claims are cognizable under Title VII. *Robinson* v. *Shell Oil Co.*, No. 93-1562, 1995 U.S. App. LEXIS 939 (4th Cir. Jan. 18, 1995). The Fourth Circuit sitting *en banc* granted rehearing and reversed course, ruling that Title VII does not afford protection to former employees. *Robinson* v. *Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995).[3]

Relying on *Robinson*, before trial the district court dismissed Dr. Polsby's post-employment claims from her consolidated actions, limiting her case to those acts of discrimination and retaliation that occurred ***during*** her fellowship and denying her the right to try any of her claims

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[2] The district court dismissed one of Dr. Polsby's retaliation claims as "too speculative." *Id.* at 13.

[3] *Robinson* reached the Fourth Circuit after Shell successfully relied on *Polsby II* to support a motion to dismiss Robinson's post-employment retaliation claims. By the time Robinson appealed to the Fourth Circuit, this Court had vacated *Polsby II* without addressing whether post-employment retaliation claims were actionable under Title VII. Accordingly, the court of appeals found that it could "write on a clean slate." *Robinson*, 70 F.3d at 328.

to a jury.[4] Joint Pre-Trial Order 24 (limiting action to Dr. Polsby's "two year medical staff fellowship and her claim of gender discrimination in * * * denial of an extension of her fellowship"); Transcript of Pretrial Conference 5 (court "would have tried the post-employment retaliation claims to a jury"). The district court expressly noted that it might "have to redo something" (*ibid.*) if this Court were to reverse the Fourth Circuit's *en banc* decision in *Robinson*.

Thus, Dr. Polsby was not permitted to complete discovery or present evidence at trial concerning any of her claims of post-employment retaliation. After a thirteen-day bench trial, the district court ruled for defendants on the remainder of Dr. Polsby's claims. *Polsby* v. *Shalala*, 925 F. Supp. 379 (D. Md. 1996) ("*Polsby V*"). Dr. Polsby again appealed to the Fourth Circuit, challenging among other things the district court's pre-trial dismissal of her post-employment claims.

While Dr. Polsby's appeal was pending, this Court unanimously reversed the Fourth Circuit's decision in *Robinson*, and ruled that Title VII affords protection to former employees. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997). Despite this Court's reversal of *Robinson*, the Fourth Circuit summarily affirmed the dismissal of Dr. Polsby's post-employment claims. Although the court of appeals acknowledged that the district court had dismissed those claims on the basis of its now-discredited decision in *Robinson*, it stated that "any error in applying the former standard was harmless as our review of the record reveals that the evidence failed to support her claims of post-employment

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[4] While noting that she "applauded the circuits that have reached the conclusion that Title 7 ought to reach post-employment retaliation," the district judge concluded that she was bound by the *Robinson* decision to dismiss Dr. Polsby's post-employment claims. Transcript of Pretrial Conference 17.

retaliation." Pet. App. 2a, *Polsby* v. *Chase*, No. 96-1793 (4th Cir. Oct. 21, 1998) ("*Polsby VI*").

ARGUMENT

I. DR. POLSBY WAS ENTITLED TO THE BENEFIT OF THIS COURT'S RULING IN *ROBINSON* V. *SHELL OIL CO.* THAT FORMER EMPLOYEES ARE PROTECTED BY TITLE VII

Almost two hundred years ago, this Court stated:

> [I]f subsequent to the judgment [in the trial court] and before the decision of the appellate court, a law intervenes and positively changes the rule which governs * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment * * * which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). More recently, this Court has strongly reaffirmed that, when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see also *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 752 (1995); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534-535 (1991). As a matter of appellate procedure, when a significant change in the law affects a case on appeal, the court of appeals normally remands the case so that the district court can apply the new rule to the facts and, if necessary, allow further development of the evidentiary record. See, *e.g.*, *Scott* v. *Norfolk Southern Corp.*, No. 97-1490, 1998 U.S. App. LEXIS 13470 (4th Cir. 1998) (vacating and remanding district court decision dismissing appellee's same-gender sexual harassment and hostile work environment

claim because of intervening change in the law permitting such claims); *Reinhold* v. *Virginia*, 151 F.3d 172 (4th Cir. 1998) (remanding for record development a case that was affected by two Supreme Court decisions); *Tarpley* v. *Jeffers*, 96 F.3d 921, 924 (7th Cir. 1996) (remanding case for determination by the district court whether plaintiff had standing in light of Supreme Court decision overruling earlier circuit case law); *Robinson* v. *Freeze*, 15 F.3d 107, 109 (8th Cir. 1994) (reversing and remanding district court grant of summary judgment following intervening change in the law because "the summary judgment record and decision in this case were developed without the benefit of the Supreme Court's decision" and the issue "should be considered in the first instance by the district court on a proper record").

When this Court announced in *Robinson* that Title VII provided protection for former employees, the federal courts were obligated to apply that rule to all pending cases, including cases on appeal. The Seventh Circuit — which like the Fourth Circuit had ruled that former employees were not protected by Title VII (*Reed* v. *Shepard*, 939 F.2d 484 (7th Cir. 1991)) — followed this rule in *Betts* v. *Container Corp. of America*, No. 95-1064, 1997 U.S. App. LEXIS 10648 (7th Cir. 1997). The district court had dismissed Betts's post-employment retaliation claim, concluding that it "was a loser because Title VII affords no remedy for post-termination retaliation against former employees." *Betts*, 1997 U.S. App. LEXIS 10648, at *2. While Betts's case was on appeal, however, this Court rendered its decision in *Robinson* v. *Shell Oil Co.*

On appeal, the Seventh Circuit observed that, by a fortuity of timing,[5] Betts "gets the benefit of a recent Supreme Court

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[5] The Seventh Circuit noted that Betts's claims, which had arisen almost a dozen years earlier, would have been closed long ago had the case moved more swiftly and not "dragged on so long." *Betts*, 1997 U.S. App. LEXIS 10648, at *1.

decision which breathes new life into one of her claims." *Betts*, 1997 U.S. App. LEXIS 10648, at *1-2. The court reversed and remanded her post-employment retaliation claims, stating:

> "Robinson means that Betts' retaliation claim has risen from the dead and ***must be remanded to the district court for further proceedings.***"

Id., at *3 (emphasis added); see also *Betts* v. *Container Corp. of America*, Nos. 98-2513 and 98-4076, 1999 U.S. App. LEXIS 3229 (7th Cir. 1999) (noting that Betts's retaliation charge had a "spark of life" after this Court's decision in *Robinson*).

Here, as in *Betts*, the district court dismissed Dr. Polsby's claims of post-employment retaliation before trial and before completion of discovery, stating that it was bound to do so by the Fourth Circuit's *en banc* decision in *Robinson* v. *Shell Oil*, 70 F.3d 325. Joint Pre-Trial Order 24. While Dr. Polsby's case was on appeal, the Supreme Court reversed *Robinson*. It could not have been clearer that Dr. Polsby was entitled to have her post-employment retaliation claims resurrected and remanded to the district court for further proceedings.

The court of appeals, however, refused to allow the *Robinson* decision to "breathe new life" into Dr. Polsby's post-employment retaliation claims. In fact, the Fourth Circuit has ***never*** found a remand to be justified in any case pending on appeal when its decision in *Robinson* was reversed, and instead ***repeatedly*** has declined to reverse and remand cases in which the district court had dismissed or granted summary judgment on an employee's post-employment claims based on the *en banc Robinson* decision. See *Polsby VI*; *Harris* v. *Prince George's County Public Schools*, No. 96-2785, 1998 U.S. App. LEXIS 7703 (4th Cir. 1998); *Karpel* v. *Inova Health Sys. Servs.*, 134 F.3d 1222 (4th Cir. 1998); *Jensvold* v. *Shalala*, No. 96-1964, 1998 U.S. App. LEXIS 6514 (4th Cir. 1998).

In two of these cases, the Fourth Circuit purported to affirm an alternative ground for decision proffered by the district court. See *Harris*, 1998 U.S. App. LEXIS 7703, at *7 (ruling that, "aside from the Robinson ruling, Harris' proffered proof failed to support his claim of discriminatory retaliation"); *Jensvold*, 1998 U.S. App. LEXIS 6514, at *3 (ruling that trial court's error in relying on *Robinson* to dismiss post-employment retaliation claims following trial "was rendered harmless by the court's determination of Jensvold's post-employment Title VII claims on the merits"). In two other cases (including this one), however, the Fourth Circuit found the reliance on *Robinson* to be harmless based on alternative grounds never considered by the court below. See *Polsby VI*; *Karpel*, 134 F.3d at 1230 (affirming grant of summary judgment for employer on employee's post-employment retaliation claims notwithstanding the intervening *Robinson* decision on ground that employee failed to establish a *prima facie* case of retaliation).

Indeed, the Fourth Circuit has questioned whether this Court's *Robinson* decision applies "retroactively" to cases pending on appeal at the time the decision was rendered, stating in one case:

> We need not decide whether the Supreme Court's *Robinson* decision applies retroactively to Inova's actions against Karpel after she had been terminated because, even assuming arguendo that the decision is retroactive, Inova's action * * *does not constitute "adverse action."

Karpel, 134 F.3d at 1230.

The Fourth Circuit's disinclination to give "retroactive" effect to the *Robinson* decision — in the face of this Court's unequivocal insistance that judicial decisions (unlike some legislation) be applied to cases pending on direct appeal— has plainly caused it to reach too far to find "harmless" the prior application of its discredited rule excluding post-employment retaliation claims from Title VII's coverage. As discussed

further below, there was simply no basis for the court of appeals' finding of harmless error in Dr. Polsby's case. In effect, the Fourth Circuit simply denied Dr. Polsby the benefit of an intervening change in the law, to her great prejudice.

II. THE FOURTH CIRCUIT HAD NO BASIS FOR DECLARING THE DISMISSAL OF DR. POLSBY'S POST-EMPLOYMENT CLAIMS "HARMLESS"

It is well-established that an error is "harmless only if it caused no prejudice to a substantial right of the party complaining of the error." 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §206.07[2] (3d ed. 1997); see also 28 U.S.C. § 2111 (1999) (an error is harmless if it does not affect "the substantial rights of the parties"). The harmless error rules permit the courts to "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984). A trial court's erroneous dismissal of an entire claim necessarily affects the "substantial rights" of the plaintiff, unless it is clear that the plaintiff for other reasons could not have prevailed on that claim. Where, as here, the error totally prevented the presentation of evidence on an otherwise sustainable claim, it is difficult to imagine circumstances under which an appellate court could properly find the error harmless. *Cf. Rose* v. *Clark*, 478 U.S. 570, 580 n.7 (1986) (in finding error harmless, noting that it "did not affect the composition of the record").

It is widely recognized, moreover, that an appellate court should resolve a question that was not addressed by the court below only in limited circumstances. Such a ruling may be appropriate if "[t]he factual record is developed and the issues provide purely legal questions, upon which an appellate court exercises plenary review." *Hudson United Bank* v. *LiTenda Mortgage Corp.*, 142 F.3d 151, 159 (3d Cir. 1998) (citations omitted). "When the resolution of the issue requires the

exercise of discretion or fact finding," however, "it is inappropriate and unwise for an appellate court to step in." *Ibid.* See also *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. * * * But it should not simply have made factual findings on its own."); *Murray* v. *United States*, 487 U.S. 533, 543 (1988) ("[i]t is the function of the District Court rather than the Court of Appeals to determine the facts").

The Fourth Circuit's wrongheaded affirmance of the district court's erroneous dismissal of Dr. Polsby's retaliation claims cast aside these well-established principles. The court of appeals not only made factual findings concerning the merits of those claims without affording the district court the opportunity to rule upon them in the first instance; it made its ruling based upon an incomplete — indeed, in pertinent respects, nonexistent — record.

Dr. Polsby's claims were dismissed before trial because the trial court understood them to be barred categorically by the Fourth Circuit's *en banc* decision in *Robinson*. See Transcript of Pretrial Conference 22-23 (limiting issues to be tried to Title VII claims arising before July 1985). Dr. Polsby thus did not complete discovery concerning her claims of post-employment retaliation; she was allowed to present no evidence at all concerning those claims during her thirteen-day trial; and the district court did not address those claims in its sixteen-page published opinion addressing the merits of Dr. Polsby's remaining claims. In short, Dr. Polsby had no opportunity to litigate her post-employment claims fully and fairly — indeed, no opportunity to litigate their merits at all — in the trial court.

Because Dr. Polsby did not have the opportunity to present evidence relating to her post-employment claims at

trial, it is not surprising that the Fourth Circuit found the evidence in the record insufficient to support those claims. By affirming on appeal despite the *Robinson* error, the Fourth Circuit created a bizarre "Catch 22" in which Dr. Polsby was erroneously denied the opportunity to prove her claims and then denied any remedy for that error ***because*** she had failed to prove her claims.

The Fourth Circuit's decision plainly was contrary to established principles of appellate review. After this Court ruled that post-employment retaliation claims such as Dr. Polsby's were cognizable under Title VII, she was entitled to litigate those claims fully before the factfinder of first instance. To ensure that Dr. Polsby had the opportunity to do so, the Fourth Circuit had only to remand the case to the district court for further proceedings consistent with *Robinson*. This Court should do grant review and order the Fourth Circuit to do so now.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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